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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 162.

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA, PETITIONER,

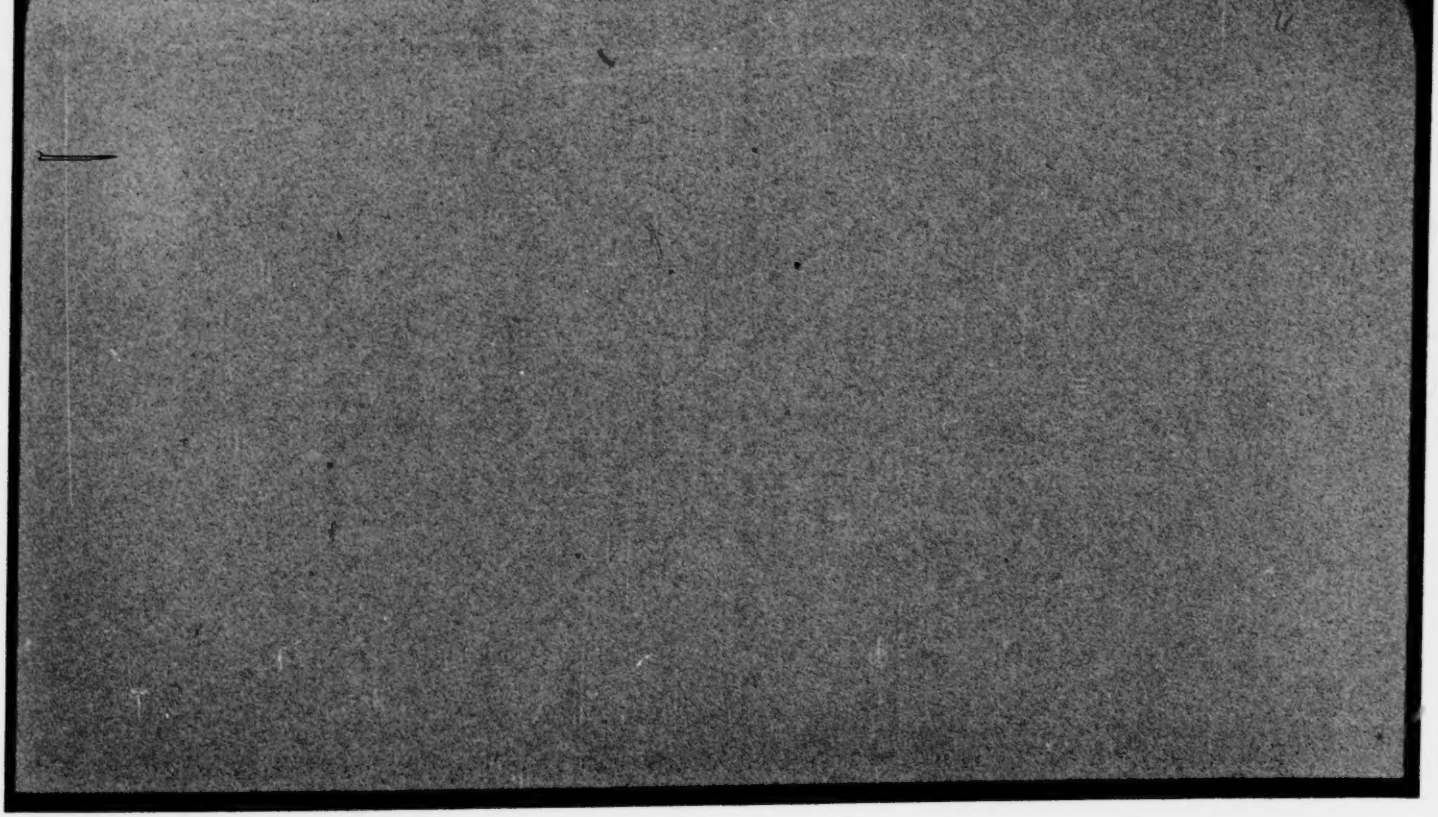
vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI FILED MAY 6, 1914. CERTIORARI AND RETURN FILED JUNE 22, 1914.

(23,067)



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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings had and done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A. D. 1912, at Atlanta, Georgia, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable Edward R. Meek, District Judge.

WILLIAM A. WRIGHT, Appellant and Cross-Appellee,
versus
LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Appellants and Cross-Appellees.

Be It Remembered, that heretofore, to-wit, on the 17th day of August, A. D. 1912, a transcript of the record of the above
b styled cause, pursuant to an appeal and cross-appeal from the District Court of the United States for the Northern District of Georgia, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2417, and that on the 20th day of September, A. D. 1912, a supplemental transcript of the record in said cause was filed, which said transcript and supplemental transcript are as follows:

c *Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 2417.

WILLIAM A. WRIGHT, Appellant,
versus
LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Appellees,

and

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Cross-Appellants,
versus
WILLIAM A. WRIGHT, Cross Appellee.

Appeal and Cross Appeal from the District Court of the United States for the Northern District of Georgia.

[Original record filed August 17, 1912.]

U. S. Circuit Court of Appeals. Filed Aug. 31, 1912. Frank H. Mortimer, Clerk.

1 *Original Bill.*

Circuit Court of the United States for the Northern District of Georgia.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
versus
WILLIAM A. WRIGHT.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Georgia:

Louisville and Nashville Railroad Company which avers itself to be a corporation created and existing under the laws of the State of Kentucky, and Atlantic Coast Line Railroad Company which avers itself to be a corporation created and existing under the laws of the State of Virginia, hereinafter styled orators, bring this their bill of complaint against William A. Wright, a citizen of the State of Georgia, resident in the Northern District thereof in the City of Atlanta, and thereupon your orators complain and say:

1. That the several parties plaintiffs and defendant are citizens and residents as hereinbefore stated; and that the matter in controversy exceeds, exclusive of interest and costs the sum or amount of two thousand dollars.

2 2. The Georgia Railroad and Banking Company is a corporation whose original charter was granted by the legislature of the State of Georgia, December 21, 1833, which original charter was thereafter amended by several acts of said legislature passed prior to January 1, 1863.

3. Under the original charter and said amendments, The Georgia Railroad and Banking Company constructed and equipped a railroad running from the City of Augusta to the City of Atlanta, and a branch railroad running from Union Point on the railroad just mentioned to the City of Athens—all in the State of Georgia.

4. Under an act of said legislature approved January 21, 1852, The Georgia Railroad and Banking Company acquired a branch railroad, extending from Barnett on its main line to the City of Washington, a distance of eighteen miles—all in said state.

5. In the year 1879 The Georgia Railroad and Banking Company being so authorized by an act of said legislature, purchased at judicial sale the railroad known as The Macon and Augusta Railroad seventy-eight miles in length and extending from the Town of Warrenton to the City of Macon—both in said state—and became and continues to be the owner of said railroad, its franchises and appurtenances.

6. On the 7th day of May, 1881, The Georgia Railroad and Banking Company, under authority given it in the twelfth section of its original charter, leased, together with other property, all of the above described railroads with their franchises and appurtenances to William M. Wadley and his assigns; and by various conveyances,

contracts and judicial proceedings your orators have become and are in succession to the said William M. Wadley the lessees of said railroad property and are and have been for many years operating the same under said lease.

A copy of said lease is hereunto annexed marked Exhibit A, and the usual leave of reference prayed.

7. Under the fifteenth section of the charter of The Georgia Railroad and Banking Company the railroads described in
3 Paragraph 2 of this bill of complaint, to-wit, the railroad from Augusta to Atlanta and the branch railroad from Union Point to Athens, their appurtenances and franchise are exempt from all taxation, whatsoever, except a tax of one-half of one per cent. of the net earnings of said exempt railroads, which is payable to the State of Georgia, and which has been continuously so paid by The Georgia Railroad and Banking Company for each and every year since the same became payable under the charter aforesaid down to and including the year 1909; and the proper return has been made by said company to the Comptroller General of the state for the payment, when they become due, of the taxes for the present year, 1910.

8. Notwithstanding the exemption of said property from taxation as aforesaid, the defendant, William A. Wright, claiming to have authority so to do as Comptroller General of the State of Georgia, sought from the year 1903 until the 21st day of February, 1910, to compel The Georgia Railroad and Banking Company to pay taxes on said property to the State of Georgia, to the counties and municipal corporations and to various school districts on the lines of said railroads.

9. The Supreme Court of the United States having decided that the railroads aforesaid were exempt from a property tax including a so-called "franchise tax," and that the legislation of the State of Georgia, which sought to impose a tax thereon, was unconstitutional, null and void; nevertheless, the defendant having failed in his persistent effort to collect taxes from the owner of the property The Georgia Railroad and Banking Company, is now seeking to levy the same taxes on the same property in the hands of the tenants of the owner, to-wit, your orators as lessees and to force your orators to pay the same.

10. In pursuance of this purpose, said William A. Wright claiming authority so to do as Comptroller General as aforesaid, did on the 18th day of May, 1910, demand of your orators a return to be made within twenty days of said railroads described in Paragraphs 2 and 3 of this bill of complaint, with the appurtenances and franchises thereof, and of all property connected with or used in
4 the operation of said railroads.

11. Your orators being advised (first) that under the law as construed by the Supreme Court of the United States the railroads described in Paragraph 2 of this bill were not subject to any property tax, whatever; and that (second) under the laws of Georgia the landlord, the owner of property, is liable for the taxes upon it and not the lessee of the property; and that there is no law in the

State of Georgia for collecting from a tenant the taxes assessable to the tenant's landlord; and being also informed that the landlord, The Georgia Railroad and Banking Company, had returned the railroad for taxation, described in Paragraph 3 of this bill (from Barnett to Washington) and stood ready to pay the taxes thereon on or before the day they should become payable. Your orators being so advised, failed and omitted to make the return demanded as aforesaid.

12. Your orators having failed as aforesaid to make the return demanded by the Comptroller General, he, on the 26th day of July, 1910, proceeded to assess the railroads described in Paragraphs 2 and 3 of the bill, their franchises, rolling stock and other personal property connected therewith, and stocks and bonds and other property at an aggregate valuation of about fourteen million dollars ($14,000,000.00). A copy of said assessment is hereunto annexed, marked Exhibit B and the usual leave of reference prayed.

13. In furnishing your orators with a copy of said assessment, said William A. Wright, as Comptroller General, notified your orators that if they were dissatisfied with the amount of the aforesaid assessment they could call for an arbitration of that question. But your orators are advised that they cannot safely participate in such arbitration, as their doing so would be an implied admission that they were liable for taxes on the property so assessed, while on the contrary they are advised that they are not so liable, and they absolutely deny such liability.

14. Your orators have no such right, title, interest or estate in the property assessed against your orators as aforesaid, as
5 makes your orators liable for taxes thereon. All of said property is now and ever has been since its creation the sole property of your orator's lessor, The Georgia Railroad and Banking Company, which company alone is liable for such tax as may be lawfully imposed on said property. Your orators are merely the tenants of said property for a term of years, which may, by the happening of contingencies expressly stated in the instrument of lease, come to an end at any time prior to the expiration of the term limited in the lease.

15. Said lessor, The Georgia Railroad and Banking Company, has never parted with its right, title and estate in said property, or sought to do so. It has never sought to be absolved, as the owner of said railroads and their appurtenances of its obligations to the public as a common carrier of freight and passengers, or of any of its obligations to the state and the public as a railroad company. On the contrary, since the date of the aforesaid lease to William M. Wadley, just as prior to said lease, The Georgia Railroad and Banking Company has been and is constantly sued by passengers or their legal representatives and shippers, and by persons who have been injured by the running of trains on its railroads, and in such cases, judgments, for which it alone is liable, have been rendered against it, and have been satisfied annually for thousands of dollars. It makes no difference in the legal status that in most cases the lessees indemnify the lessor against such judgments.

16. Not only has said The Georgia Railroad and Banking Company never divested itself of this property; not only has it never sought to evade its liability to the public as the owner and the responsible operator of its railroads; it has also recognized its obligation to pay all lawful taxes imposed upon it as the owner of said property. This status and this relation to the subject of taxation have been uniformly and continuously recognized and acted on by the State of Georgia until the actings and doings of the defendant as herein complained of. During the twenty-nine years of the lease preceding said acts and doings, the state has collected and sought to collect taxes on the leased property only from the lessor. For this very year 1910, while defendant is proceeding to collect taxes from your orators on that part of the leased property de-
6 scribed in Exhibit B he has accepted from the lessor a return for taxation of a part of the leased property, and will in due time collect the taxes on that return. The property referred to is The Macon and Augusta Railroad, to which your orators hold the same relation that they hold to the property, for which defendant is now seeking to exact taxes from your orators.

17. Your orators do not claim that the property covered by the charter of The Georgia Railroad and Banking Company, which has been assessed by the defendant as per Exhibit B, is exempt from taxation. On the contrary, your orators aver that it is taxable, but in accordance with a special scheme of taxation enacted by the wisdom of the legislature, dealing at that date with the economic conditions and governmental problems of the day. It was never the purpose of the legislature to relieve that company from all taxation, but to encourage an untried enterprise of great benefit, if successful, to the state. In pursuance of that purpose, the legislature devised a system of taxation for the enterprise which it desired to foster. The principle, therefore, that immunity from taxation granted to a corporation will not pass by a sale to another person of the corporation's property and franchises has no application in this case.

18. One of the uses which The Georgia Railroad and Banking Company was authorized to make of its railroads (See Section 12 of its Charter) was "to rent or farm out all or any part of their exclusive right of transportation or conveyance." When in a subsequent section (See Section 15) the special scheme of taxation applicable to this corporation was enacted, it was so enacted for the corporation which had been formed and shaped up and endowed with certain faculties by the preceding sections; and no limitation was put on the conditions and circumstances under which that scheme of taxation should operate or should cease; and there was no limitation even that the one privilege should be annulled by the exercise of another privilege granted with equal clearness.

19. Defendant pretends that the special scheme of taxation provided by the legislature for the property of The Georgia Railroad and Banking Company was a "personal" privilege granted to
7 said corporation, and was not a quality or condition annexed to the property itself.

Your orators deny this proposition and aver on the contrary that this scheme of taxation was intended to attach to "this pioneer railroad," and that under no contingency was this particular railroad to be subject to any other taxation than one measured by the amount of its net profits.

20. But even if the contention of defendant be correct that this scheme of taxation is "personal" to The Georgia Railroad and Banking Company, your orators aver that the establishment of that proposition does not make the leased property liable to taxation. For they say the property remains the property of the person to whom this personal privilege in relation to it was granted. That person has never divested itself of the title to it, nor sought to avoid, nor, if seeking so to do, could avoid any of its obligations to the state and to the public. The obligations, which accompany this privilege are just as binding now as they were prior to the lease aforesaid. Those obligations also are just as fully observed now as then. The Georgia Railroad and Banking Company has not been relieved, nor sought to be relieved, of a single one of its duties to the state and the public touching this property. It has continuously paid to the state the taxes payable under its charter and the state for the twenty-nine years during which the lease has been in force, has accepted those taxes. It is liable in law for the proper management of the property for the service of the public, although the agencies by which the service is rendered, are its lessees; and, as has been hereinbefore stated, it has continuously admitted its liability to the public for the conduct of its lessees by submitting to suits based on their conduct. In a word, The Georgia Railroad and Banking Company has done nothing or omitted nothing or permitted nothing which would in any way defeat or suspend the operation of the "personal" privilege, even if it were personal—which your orators deny.

21. Notwithstanding that defendant pretends that the property which he has assessed in accordance with Exhibit B of this bill of complaint has been so transferred by its owner, The Georgia Railroad and Banking Company, as to deprive it of the protection of the charter of that company; nevertheless, the defendant, as
8 Comptroller General of the State of Georgia, has required of said company and has received from it the return for taxation under the provisions of said charter. That is to say under said charter the property is subject to a tax of one-half of one per cent. of its net earnings, and defendant has required and received a return for taxation accordingly for the same period, to-wit, the year 1910, for which he has made the aforesaid assessment. So that defendant is on the one hand taxing property in the hands of The Georgia Railroad and Banking Company in the manner prescribed by its charter, and on the other hand is proposing to tax the same property for the same period in the hands of your orators under the general tax laws of the state—thus double taxing the same property.

22. Under the law of Georgia "taxes are to be charged against the owner of property if known." There is no law or usage of said state by which the owner of property is passed over and the taxes on his property are charged to his renter, tenant or lessee.

As a fact, which your orator here aver, taxes are never charged to such renter, tenant or lessee, and if defendant carries out his purpose, which he has commenced by the assessment aforesaid, your orator will not only be made to pay an enormous sum of money in the shape of taxes unlawfully assessed and collected, but will also be denied the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States, and in violation of Art. 1, Sec. 1, Par. 2 of the Constitution of the State of Georgia, providing that "Protection to person and property is the paramount duty of government and shall be impartial and complete;" and further in violation of Art. 7, Sec. 2, Par. 1 of the Constitution of the State of Georgia that, "All taxation shall be uniform upon the same class of subjects." And your orators do further aver that the assessment against them of taxes on property belonging to the Georgia Railroad and Banking Company and the proceedings to collect of your orators such taxes on such property of the Georgia Railroad and Banking Company is to take your orators' property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United
9 States, providing that "No state shall deprive any person of life, liberty or property without due process of law."

23. Your orators aver that the defendant, William A. Wright, having made the unlawful assessment aforesaid as the first step in his purpose, will, unless restrained by the order of this Honorable Court, proceed further therein and will levy the unlawful tax aforesaid and collect the same by the sale of the property of which your orators are entitled to the use and enjoyment for a term of years.

24. Your orators being remediless under the rules of the common law and unable to obtain relief except in a court of equity, to the end that the defendant, William A. Wright, may, if he can, answer the several charges hereinbefore made against him, but not under oath, waive discovery from said defendant and pray:

First. That it be adjudged that your orators are not or either of them, chargeable with taxes or any part of them on the property included in the assessment aforesaid.

Second. That the said William A. Wright, Comptroller General, be enjoined from proceeding further in charging your orators with the taxes aforesaid and especially from issuing any execution for the collection of the same.

Third. That your orators may have all other and further relief that their case may require and equity can afford.

To the end that your orators may obtain the relief to which they are justly entitled in the premises, they now pray the Court to grant them due process by subpoena, directed to the said William A. Wright, the defendant hereinbefore named, requiring and commanding him to appear herein and answer, but not under oath, the same being expressly hereby waived, the several allegations in this, your orators' bill, contained.

And your orators will ever pray, etc.

JOS. B. & BRYAN CUMMING,
McDANIEL, ALSTON & BLACK,
Complainants' Solicitors.

10 GEORGIA,
Fulton County:

Before me personally appeared Thomas K. Scott, who on oath says: That he is the general manager for the Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company of the properties sought to be taxed or assessed in the foregoing bill of complaint, and the representative of said complainants as to all of said properties; and that the facts stated in the foregoing bill are true, except where they are stated on information and belief, and the facts so stated he believes to be true.

THOS. K. SCOTT.

Sworn to and subscribed before me this 12th day of August, 1910.
WALTER T. COLQUITT,
United States Commissioner for the Northern District of Georgia.

Original bill filed in clerk's office September 24th, 1910.
O. C. FULLER, *Clerk*.

EXHIBIT "A" TO ORIGINAL BILL.

Lease.

The Georgia Railroad and Banking Company
to
William M. Wadley.

GEORGIA:

This indenture made this seventh day of May, Anno Domini one thousand eight hundred and eighty-one, between The Georgia Railroad and Banking Company, a corporation under the laws of said state, party of the first part, and Wm. M. Wadley, of Monroe County in said state, party of the second part; witnesseth, that the party of the first part in conformity with the provisions of its charter and acting in this behalf in pursuance of a resolution of its board of
11 directors, regularly convened the twelfth day of April in the year one thousand eight hundred and eighty-one, for and in consideration of the covenants, conditions and agreements hereinafter set forth on the part of said party of the second part.

Hath rented and farmed out to said party of the second part and his assigns, and does by these presents rent and farm out to said party of the second part and his assigns for the full term of ninety-one years from the first day of April, one thousand eight hundred and eighty-one.

All its privileges, general and exclusive, of transporting persons, merchandise, produce and every kind of property, whatsoever, which is or may become the subject of railroad transportation over the lines of railroad owned or controlled by the party of the first part, to the full extent that the party of the first part has and enjoys

or is now entitled to have and enjoy or may hereafter acquire the right to have and enjoy such privileges and subject to all the obligations and duties imposed by its charter in this behalf upon the party of the first part.

And the party of the first part has also rented and farmed out and does by these presents rent and farm out to the party of the second part for the aforesaid term of ninety-nine years, as the means of full enjoyment of the privileges hereinbefore rented and farmed out, the following property, to wit:

The Georgia Railroad from Augusta to Atlanta and its branches, viz., the Branch from Barnet to Washington; the Branch from Camak to Warrenton, and the Branch from Union Point to Athens, with all the extensions thereof which may be made hereafter to other points.

Also the Macon and Augusta Railroad from Warrenton to Macon.

Together with the rights of way, roadbeds, depots, stations, warehouses, elevators, workshops, wells, cisterns, water tanks and other appurtenances of said railroad and branches.

And the party of the first part also hereby assigns to the party of the second part, so far as it can lawfully do so, any right it may have to extend any of said railroads or branches.

And the party of the first part also assigns to the party of the second part and his assigns, all its right, claim, interest and demand in, to and upon the Walton Railroad, so that the party of the second part may have the same right touching the bonds of the
12 Walton Railroad Company, that he has by virtue of these presents in reference to the bonds of the Augusta and Port Royal Railway as hereinafter provided.

And the party of the first part also assigns by these presents to the party of the second part and his assigns all the right of ownership, management, control and use of the Western Railroad of Alabama, which the party of the first part now has or is entitled to; provided, that when either branch of the Western Railroad of Alabama from Opelika into Georgia shall be sold one-half of the proceeds of the sales shall be received by the party of the first part.

But in consideration that the party of the second part and his assigns will thereby lose the free use of the property of the party of the first part in the branch so sold, the party of the first part will in that event pay to the party of the second part and his assigns interest on said half of the proceeds at the same rate that the then bonds of the Western Railroad of Alabama or its successors may bear at the date of payment of the interest of said bonds. That is to say, if said bonds shall bear eight per cent. interest, that rate of interest shall be paid on one-half of the proceeds, and if said bonds bear six per cent. interest, then that rate of interest shall be paid on one-half of the proceeds, and so from time to time.

The party of the first part also agrees to assign and transfer to the party of the second part and his assigns, for and during said term of ninety-nine years, the income of the stock now held by the party of the first part in the Atlanta and West Point Railroad Company,

to wit, four thousand four hundred and nine shares; and in the Rome Railroad Company, to wit, fourteen hundred and eighty-nine shares and three-eighths of a share.

Also to give to the party of the second part and his assigns an irrevocable power of attorney to vote said stocks, with the restrictions hereinafter indicated, as fully as the party of the first part might vote them if this agreement had not been made.

Also, to assign and transfer to the said party of the second part and his assigns, for and during said term of ninety-nine years, the income of the stock and of the bonds held by the party of the first part in the Port Royal and Augusta Railway Company, and to give to the party of the second part and his assigns an irrevocable
13 power of attorney to vote said stocks and bonds, with the restriction hereinafter indicated, as fully as the party of the first part could vote them if this agreement had not been made.

But this provision is not to include the claim of the party of the first part on the Compress Company of Port Royal, its compress, elevator and other property of said compress company.

And if the said bonds of the Port Royal and Augusta Railway Company should be collected at any time by the party of the first part, then the party of the first part will pay to the party of the second part and his assigns interest on said collection for and during the unexpired period of said term of ninety-nine years, at the then current legal rate of interest of the State of Georgia, not exceeding six per cent. per annum.

The party of the first part also agrees to deliver to the party of the second part and his assigns all steel rails which have been contracted for by the party of the first part, at the expense of the party of the first part.

The party of the first part also agrees to pay the principal and interest of the bonds of the party of the first part and of The Macon & Augusta Railroad Company; provided, that nothing herein contained shall be construed as impairing or in any way affecting the right of the party of the first part to renew any of said bonds.

And the party of the first part also agrees to pay the taxes which may be payable under the charter of the party for the first part, on the rental hereinafter stipulated, or on so much thereof as may be taxable, and all taxes, if any, which may become by law collectable from the party of the first part on the shares of its stock in the hands of its shareholders. But all other taxes which may be payable on the property and franchises, which, or the control, use or enjoyment of which, is hereby rented, farmed out, assigned or transferred to the party of the second part and his assigns, shall be paid by the party of the second part and his assigns.

This indenture is not to affect the ownership, use and enjoyment of the party of the first part as to all the cash, notes, claims, demands, rights and credits, owned by the party of the first part on the first day of April, eighteen hundred and eighty-one.

14 The banking house, banking privileges and banking business of the party of the first part are no wise affected by this indenture.

The lands, houses and tenements belonging to the party of the first part, other than its elevator and appurtenances in the City of Augusta, not necessary or used for railroad purposes, are not affected by this indenture, and contracts relating to such houses, lands and tenements made before the date of these presents, although not yet executed, shall not be affected by this agreement, but may be carried out by the party of the first part.

All contracts now existing between the party of the first part and other railroad companies, except as otherwise and hereinbefore provided, shall be carried out by the party of the second part and his assigns; provided, that the party of the second part and his assigns shall have the same right to modify, change or abrogate said contracts which the party of the first part now has.

In consideration of the things hereinbefore agreed to be done by the party of the first part, the party of the second part hereby covenants for himself and his assigns to pay to the party of the first part the sum of six hundred thousand dollars annually, for the full term of ninety-nine years, in two semi-annual payments of three hundred thousand dollars each, the first of said semi-annual payments to be made on the first day of October, eighteen hundred and eighty-one, and the others on the first days of April and October, thereafter, and said payments to be made in such money as is legal tender of the United States at the times of such payment.

The party of the second part also covenants for himself and his assigns to return the property hereinbefore rented, farmed out and assigned to the party of the second part in as good condition as it is now in and unimpaired in value, that is to say, the railroads and their appurtenances as well adapted to the business of transportation as they now are, and the personal property in personal property equal in value and as well adapted to its uses as it now is. And the property substituted for and added to that which is hereby rented and farmed out, shall be the property of the party of the first part, to the same extent as the original property, for which it may be substituted or to which it may be added, was the property of the party of the first part.

15 And the party of the second part also covenants for himself and his assigns to keep the railroads and their appurtenances and the means of transportation in first-class condition of such property, and also to indemnify the party of the first part against any damages, losses or liabilities which may be incurred by reason of the operating of the railroads, the use and control of which are hereby granted and farmed out.

The party of the second part also covenants for himself and his assigns that he and they will pay the interest demandable of the party of the first part on the bonded indebtedness of the Western Railroad of Alabama, so that said indebtedness shall never be increased; and at the termination for any cause of this agreement, to return the property which the party of the first part has in said railroad without any greater encumbrance thereof than it now bears.

But the party of the first part will consent to the organization of the owners of the Western Railroad of Alabama into a corpo-

ration and to the issue by said corporation of bonds to renew bonds maturing from time to time, for which the said Railroad of Alabama is liable, which said bonds the party of the first part hereby agrees to indorse or guarantee to the same extent that it is now bound for the bonds of the Western Railroad of Alabama; provided, that said corporation shall not impair the beneficial ownership of said railroad by the party of the first part and provided, further, that the aggregate amount of bonded indebtedness of said railroad and the rate of interest thereon shall not be increased to an amount and rate exceeding the present amount of bonds and present rate of interest.

The party of the second part also covenants for himself and his assigns that the privileges of free passage to the stockholders and directors of The Georgia Railroad and Banking Company shall be continued to the same extent as they are now enjoyed by stockholders and directors, respectively, according to the present usages of said company.

The party of the second part also covenants for himself and his assigns that he and they shall have no power to encumber or to assist in encumbering or to permit to be encumbered, the property or stocks passing into the control of the party of the second part by virtue of this indenture to the full extent that the said party has control, except the Western Railroad of Alabama, as here-
16 inbefore provided, and that he and they will not for such purpose vote any of the stocks or bonds of the corporations the power of voting which is hereinbefore given, and that the irrevocable powers of attorney hereinbefore stipulated to be given may be restricted on their face in this respect.

The party of the second part also covenants for himself and his assigns that the party of the first part shall have the right to enter upon and inspect the railroads hereinbefore mentioned, and appurtenances including the rolling stock used on the same, by persons selected by the party of the first part, as often as the party of the first part may think proper.

The party of the first part reserves the right, in addition to all other remedies now usual or hereafter to become usual in the law, to enter upon and resume possession and enjoyment of its property for the breach of any of the covenants or agreements of this indenture.

At the termination for any cause of this lease, all necessary and proper betterments which shall have been made by the party of the second part or his assigns shall be paid for at their then fair value by the party of the first part.

Provided, always, that nothing herein contained shall be construed as giving or attempting to give to the party of the second part or his assigns the right to do or omit any act or thing, the doing or omission of which would furnish a ground for forfeiture of the charter of the party of the first part, and all such acts and omissions are hereby declared to be contrary to the terms and spirit of this indenture, and void.

In order to guarantee the performance of the agreements and

covenants, hereinbefore made by the party of the second part, said party of the second part further covenants for himself and his assigns to deposit in such place and in such manner as the president of the party of the first part may designate, one million dollars in bonds of the United States or in other bonds of equal value—said deposit to be kept up to the clear market value of one million dollars; provided, the party of the *party of the* second part and his assigns shall have the privilege of collecting for his or their own benefit the income of said bonds and of changing the kind of bonds from time to time, and of substituting for bonds other and different security; provided, such other and different security be first approved by the party of the first part.

17 And the party of the second part also covenants for himself and his assigns that his and their legal rights and privileges under this indenture shall be so preserved by him that the deposit of one million dollars of security for the due and faithful performance of the terms and conditions of this indenture shall remain and continue so subject during the entire term of the lease without impediment or embar-assment growing out of distribution, or want of representation of the estate of the party of the second part or any of his assigns; and that it is the true intent and meaning of these presents that said deposit of security shall at all time remain as a guaranty for the covenants of this indenture and liable to any proceedings at law or in equity to enforce the rights of the party of the first part without let, hindrance or delay on account of the death of the party of the second part, or any of his assigns, testate or intestate, and that death of the party of the second part or any of his assigns, testate or intestate, and the failure of legal representation of his or their estate for any period whatsoever, shall be no excuse for the non-performance of any of the covenants or agreements of the party of the second part.

It is agreed that within sixty days from the date of these presents, a full and complete inventory of all the property delivered under this agreement, showing its character, condition and value, shall be made by two disinterested experts and annexed to this indenture as a part thereof—said inventory to be made at the joint expense of the parties of the first and second parts.

In witness whereof, the party of the first part has caused its president to sign these presents and its corporate seal to be affixed hereunto, and the party of the second part has hereunto set his hand and seal the day and year first above written.

In duplicate.

THE GEORGIA R. R. & BANKING CO.,

[CORPORATE SEAL.]

By C. H. PHINIZY, *Pres't.*
WM. M. WADLEY. [L. S.]

Signed, sealed and delivered in presence of:
A. R. LAWTON.
JOS. B. CUMMING.
HENRY C. GOODRICH,
Notary Public, Richmond Co., Ga.

18 GEORGIA,
Richmond County:

Recorded in clerk's office, Superior Court of said county, Book KKK, folios 711, 712, 713, 714, 715, and 716, May 26th, 1881.

WM. E. KEENE,
Deputy Clerk Superior Court, R. C., Ga.

EXHIBIT "B" TO ORIGINAL BILL.

STATE OF GEORGIA,
County of Fulton:

Whereas, the Louisville & Nashville Railroad Company and The Atlantic Coast Line Railroad Company, are railroad companies jointly operating a railroad from Augusta to Atlanta, with branches from Union Point to Athens and from Barnett to Washington, all in said state and known as the Georgia Railroad;

And whereas, said companies did fail on or before May 1st, 1910, to make to the undersigned comptroller general of Georgia, through their presidents or otherwise, a return under oath of their property for taxation for the year 1910, as required by law;

And whereas the undersigned did on May 18th, 1910, notify said companies in writing of their delinquency and demanded of them that a return be made within twenty days of said railroads with the appurtenances and franchises thereof, and of all property connected with or used in the operation of said railroads, or in default the same would be assessed for taxation for state, county, municipal and school district purposes as provided by law;

And whereas, said companies have wholly failed and refused to make such return;

Now therefore, in obedience to the statutes in such cases provided I have from the best information obtainable assessed the above mentioned properties for taxation for state, county, municipal and school district purposes for the year 1910, as follows:

The railroad from Barnett to Washington and realty con-
19 nected therewith at $222,453; the franchise thereof at $1,-
800; and the rolling stock and all other personal property connected therewith at $15,747.

The railroad from Augusta to Atlanta and from Union Point to Athens, and realty connected therewith, exclusive of terminals separately assessed below, at $6,736,748; the franchise thereof at $2,527,436; and the rolling stock and other personal property used in connection therewith, including stocks and bonds valued at $1,348,900 at $3,891,436.

The tracks, buildings and other property at Atlanta, known as the Atlanta Joint Terminal at $2,813,786.

The tracks and buildings and other property at Augusta known as the Augusta Terminals at $325,000.

In witness whereof I have hereunto set my hand and official seal this July 26, 1910.

(Signed) WM. A. WRIGHT,
Comptroller General.

I have this day notified the above named railroad companies of the above assessments by mailing a copy thereof to Milton H. Smith, president L. & N. R. R. Co., Louisville, Ky., and J. R. Kenley, vice president A. C. L. R. R. Co., Wilmington, N. C., and Thos. K. Scott, general manager Ga. R. R., Augusta, Ga.

Answer of the Defendant.

In the Circuit Court of the United States for the Northern District of Georgia.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WILLIAM A. WRIGHT,

And now, reserving the benefit of the many imperfections in the bill contained, comes the respondent, William A. Wright, and answering says:

1. The allegations of paragraph 1 are admitted.

20 2. It is admitted that the Georgia Railroad and Banking Company was chartered by the Legislature of the State of Georgia by an act approved December 21, 1833, and that the charter has been several times amended since.

3. It is admitted that under said charter and amendments said company constructed a railroad from Atlanta to Augusta and a branch thereof from Union Point to Athens, all in said State.

4. It is admitted that under an act of the Legislature approved January 21, 1852, said The Georgia Railroad and Banking Company acquired a railroad from Barnett to Washington in said State.

5. The allegations of paragraph 5 regarding the purchase of the Macon and Augusta Railroad respondent believes to be true.

6. Respondent admits that the Georgia Railroad and Banking Company about May 7, 1881, executed a lease for the term of ninety-nine years of the railroads hereinbefore mentioned, and an assignment of other property therein referred to, to W. M. Wadley, and that Exhibit A of the bill is a copy thereof, Respondent admits that complainants are now operating, and claiming to do so by virtue of said lease, but what means or under what conditions they became entitled to said lease respondent does not know, and cannot answer.

7. Respondent admits that under the charter of the Georgia Railroad and Banking Company the "stock of said company" was exempted from any taxation save a tax to the State of Georgia of one-half of one per cent upon the net income of its investments, and that said company has paid what it represented to be such a tax each year up to and including 1909. A return of said company proposing to pay such tax as the tax upon the railroads named in the petition for the year 1910, was tendered, but the same was rejected by respondent upon the ground that complainants should pay the taxes upon said railroads as more fully stated hereafter.

8. Since the adoption in 1877 of the present Constitution
21 of Georgia, which declares that taxation shall be uniform upon the same class of subjects, and ad valorem upon all property subject to be taxed within the territorial limits of the authority levying the tax; and since the enactment of laws devolving the duty upon the comptroller-general of assessing the property of railroad companies for taxation for state, county, municipal, and school district purposes; respondent has been seeking to exact from all railroad companies operating in said state their just proportion of taxes, and did in 1903 insist upon the Georgia Railroad and Banking Company's paying ad valorem taxes upon the railroads mentioned in the petition, the fact of their having been leased being left entirely out of consideration.

9. It is true that litigation with the Georgia Railroad and Banking Company over said taxes for 1903 resulted in a decree of this Court, affirmed save as to the Washington Branch by the Supreme Court of the United States, which restrained respondent from collecting from said Georgia Railroad and Banking Company ad valorem taxes on the railroad from Augusta to Atlanta, and from Union Point to Athens, in so far as the same represented investments of the stock of said company which is exempt as aforesaid. Said decree, however, involved no consideration of the lease, or of the liability of the complainants to pay taxes to the State of Georgia and the political divisions thereof, and respondent denies that the litigation respecting the taxes due by the Georgia Railroad and Banking Company has any relevancy to the question what taxes if any these complainants are liable to pay.

10. Answering paragraph 10, respondent avers that long prior to May 1, 1910, the date fixed by law for the returns for taxation of railroad companies to be made, he notified both the Georgia Railroad and Banking Company and the complainants that the latter would be expected and required to make return of the railroads operated by them under said lease from the Georgia Railroad and Banking Company and of their property used in connection therewith. No return having been made by the complainants as requested, on May 18, 1910, a formal demand for a return in twenty days of said railroad so leased and of all property connected with or used in the operation of said railroads, was made as by statute provided.

22 11. It is true that complainants refused to make any return as stated in paragraph 11. Respondent denies that the advice therein alleged to have been given complainants was correct either in fact or law, as more fully set forth hereafter.

12. It is true that upon the refusal of complainants to make such return, respondent, under the statute in such cases provided assessed for taxation said railroads so operated by complainants, with their franchises, and the rolling stock and other personal property used in connection therewith, and the terminals at Atlanta and Augusta, at an aggregate value of about sixteen million dollars, as shown by Exhibit B of the petition, the Macon and Augusta Railroad not being included therein.

13. It is true that respondent, in notifying complainants of said

assessment advised them that if dissatisfied therewith they could call for an arbitration, as by statute provided.

14. Respondent denies that the complainants have no such interest or estate in the property sought to be taxed as renders them liable to pay taxes thereon, and denies that the Georgia Railroad and Banking Company is alone liable to pay taxes thereon, for reasons more fully set out below.

15. It is admitted that in leasing its railroads and franchises the Georgia Railroad and Banking Company did not and could not relieve itself from liability to the individuals of the public for any wrong use thereof by the lessees, such being the law as between such individuals and the corporation. It is denied, however, that the protection thus reserved by law to the individuals of the public has any bearing upon the liability of the complainants to pay taxes. It is also denied that the Georgia Railroad and Banking Company parted with no title or estate in said railroads nor sought to do so; but on the contrary, it is averred that in Georgia a leasehold is an estate in realty, and differs from a mere tenancy under a landlord, in that the exclusive and absolute right of possession and control for the term of the lease is in the lessee, with a mere estate in reversion in the lessor.

16. The allegations of paragraph 16 are denied as made. It is true that the Georgia Railroad and Banking Company has
23 paid one-half of one per cent upon $600,000, which it represented to be the net income of its investments, during recent years. It is also true that hitherto respondent, in oversight and disregard of said lease, has not sought to tax complainants as railroad companies doing business in this State. But it is denied that either such payment or such oversight in the past operates to deprive the state or its divisions of their taxes due by complainants.

It is denied that respondent intends to collect taxes on the Macon and Augusta Railroad both from the Georgia Railroad and Banking Company and from complainants. There is no dispute as to the taxability ad valorem of that railroad, and it is immaterial to the state which company pays them, but respondent has distinctly notified all parties that he considers the complainants as the proper parties to return and pay taxes on the leased property.

17. Answering paragraph 17, respondent says that the stipulations in the charter of the Georgia Railroad and Banking Company under which complainants seek to shield themselves, while not a total exemption from taxation, are in substance and effect a partial exemption from taxation, and subject to all the rules and restrictions applicable to exemptions from taxation. It is only because such stipulations do operate as a partial exemption from full taxation, that complainants are now seeking to invoke their protection.

18. Answering paragraph 18, it is doubtful whether the Legislature, in granting permission to the Georgia Railroad and Banking Company to "rent or farm out all or any part of the exclusive right of transportation or conveyance" upon its roads, had in contemplation such a lease as the present, rather than the limited usufruct in an ordinary rental from landlord to tenant. But were it

otherwise, there was no express provision that a lessee would be taxable only according to the scheme provided for the lessor, and that both should be alike partially exempt, but the status of the lessee in respect of taxation was left to the principles of general law. No special contract regarding his taxation has been made by the Legislature with any lessee.

19. Respondent avers that the partial exemption from taxation of the "stock" of the Georgia Railroad and Banking Company was personal to and operative to protect that company alone, and regulated the taxation of said railroads only to the extent that the same represented investments of said stock, and were possessed and operated by said company, and was not a covenant or contract running with the property into whosoevers hands the title in possession thereto might come.

20. Answering paragraph 20, respondent says that the obligations of the Georgia Railroad and Banking Company to the individual members of the public are beside the question, as likewise the taxes that said company has paid or may be willing to pay. He avers that the fact remains that the partial exemption from taxation granted to that company was granted to and protects it alone and cannot be transferred or extended to any other person. It also remains that said lease has been executed, and under it the lessees are also liable to the public for their defaults, and being the owners of the estate in possession are liable for the taxes on said railroads.

Respondent further avers that the parties to said lease recognize that the lessees would be liable to pay the taxes upon the property leased and expressly contracted therein as follows:

"But all other taxes, which may be payable on the property and franchises, which, or the control, use and enjoyment of which, is hereby rented, farmed out, assigned and transferred to the party of the second part and his assigns, shall be paid by the party of the second part and his assigns."

21. The allegations of paragraph 21 are denied. On the contrary respondent declined to receive for the year 1910 any return from the Georgia Railroad and Banking Company respecting the property in dispute, and is not attempting and will not attempt to tax the same property doubly, once in the hands of said company and again in the hands of complainants.

22. Answering paragraph 22, respondent says that under the law and usage in Georgia, where the title has been divided into successive estates, the owner of the estate in possession is treated as the owner for the purposes of taxation. A mere tenant or renter, having no estate in Georgia, is not taxable in respect of the realty he occupies. Complainants are the owners of an estate in possession, greater in value and duration than any life estate. And respondent avers that in the present instance the parties themselves have determined by stipulation in the creation of the estate in possession that the possessor shall pay the taxes, and the lessees cannot complain that the State should ask them to do what they have agreed to do and bound themselves to do.

Respondent denies that his demand for taxes denies to complainants the equal protection of the laws, or takes their property without due process of law, or exacts taxation not uniform on the same class of subjects, as averred in said paragraph.

23. Respondent admits that he expects to collect the state taxes by a sale if necessary of the property of complainants, but probably not by sale of the leased property.

And for further answer in this behalf respondent says:

The complainants are foreign railroad companies doing business in Georgia, and are subject to be taxed on their property in the state as other railroad companies are.

The railroads mentioned in the petition are jointly used by the complainants in connection with extended systems of railroads operated by them, and besides the traffic natural to be done by said railroads a large traffic in through transportation is done over them by virtue of their said operation as a part of said systems.

The property values in respect of which respondent claims that said companies are liable to taxation in this behalf may be classified as follows:

I. Property as to which no substantial contention exists, being confessedly subject to ad valorem taxation as against someone, and which taxation the lessees in the lease agreed to pay. This includes the Macon and Augusta Railroad, and the Washington Branch Railroad, and their franchises.

II. The railroad from Augusta to Atlanta and that from Union Point to Athens and the other property referred to in the assessment exhibited in the petition, which is sought to be pro-
26 tected by the exemption granted to the Georgia Railroad and Banking Company. This may be sub-classified as follows: (*a*) The original railroad property and franchises of the Georgia Railroad and Banking Company in the condition in which the same were delivered to the lessees in 1881. (*b*) The additions to and betterments and improvements of said property made by the lesses since said lease. (*c*) The Augusta Terminals, which were mostly constructed by the lessees since said lease. (*d*) The Atlanta Joint Terminals, mostly constructed by the lessees, and now used by them not only in connection with said railroads, but also in connection with other railroads, and for other purposes. (*e*) The rolling stock and other personal property belonging to the lessees, which was never the property of the lessor. (*f*) The bonds which were assigned to the lessees in said lease.

As to each of these sub-classes respondent alleges as follows:

(*a*) By the charter of the Georgia Railroad and Banking Company the "stock of said company" was partially exempt from taxation. This exempt stock, originally given a lower limit of $1,500,000, was finally given an upper limit of "not exceeding four millions of dollars." Said sum, as respondent is informed and believes, was raised and invested in the railroads under discussion. In addition thereto, prior to said lease, said Georgia Railroad and Banking Company issued its bonds, one series for $1,000,000 maturing January 1, 1904, as at present renewed, one series for $1,200,000 ma-

turing January 1, 1922, and one series for $300,000 maturing January 1, 1922. Said bonds were authorized by acts of the Legislature since 1863, at times when said Legislature had no power to grant irrevocable exemptions from taxation. From the sale of said bonds at par, as respondent alleges, said Georgia Railroad and Banking Company raised the sum of $2,500,000 which was not its stock, and not exempt from taxation, and invested the same in the property afterwards leased as aforesaid. So that said property represented not only the investment of said stock, but of said unexempt funds also, and respondent avers that a value of $2,500,000 of said property was at the time of said lease, and still is taxable even as against the Georgia Railroad and Banking Company, and a fortiori against complainants.

Said railroads and franchises, in so far as they represent
27 the investment of the stock of the Georgia Railroad and Banking Company, and so long as they are possessed and operated by said company, respondent admits were taxable only according to said charter. But respondent contends that by virtue of the lease aforesaid the lessee became under the laws of Georgia invested with title to an estate in possession in said property for a term of ninety-nine years, greater in value than any life estate, and as such owners became liable to pay all taxes assessed against said property during said term without right of recourse against the owner of the reversion, especially in view of the express agreements with the owner of the reversion that such taxes should be paid by the lessees. And against said liability for taxes said lessees are not entitled to plead any exemption of the Georgia Railroad and Banking Company, the same being personal and non-assignable, and no effort even having been made to assign it, but said company standing without any interest whatever in the taxes which the complainants may owe.

And respondent avers that the leasehold estate itself of complainants, for a term of seventy years yet, is more valuable than any life estate could be, and worth, in said leased property as unimproved, a sum of four million dollars, and that the same is in all events taxable to the complainants.

(*b*) But said railroads so leased were at the time of the lease poorly equipped, laid with light iron, unballasted, and with deficient depots and terminals. Since said lease the complainants and their predecessors as lessees have made large additions and improvements. In almost every country through which said railroads pass additional right of way has been acquired, additional side tracks laid, new stations established with side tracks and depots, and new depots built at old stations. The main tracks have been relaid with steel of nearly double the weight of the former rails, and the track ballasted with rock and other substances. New steel bridges instead of former wooden ones have been erected across the Oconee River at Athens and Carey, and across the Yellow and Alcovy Rivers. All said additions and improvements have been made with funds of the complainants, and for their advantage and benefit in the enjoyment of their leasehold estate. Said funds so invested were not exempt

from taxation, and the Legislature has never attempted to
28 consent to their withdrawal by such investment from taxation. The Georgia Railroad and Banking Company paid nothing toward said improvements, gets no increased consideration by reason thereof, and should any of them remain at the end of the lease, would under its terms have to make compensation for and purchase the same.

For the present said values are the property of complainants and the increased value of said railroads by reason thereof, which respondent avers to be about four million dollars, is taxable to said lessees. Such would be the case were there no stipulation thereabout in the lease, and especially so when it is stipulated that the lessees shall pay all taxes on the property.

(*c*) In Augusta, Richmond County, Georgia, complainants have purchased since said lease additional lands to those leased, and on them and on such leased land have laid out extensive track yards and constructed many tracks. They have also built a large freight depot, costing about fifty thousand dollars, and a handsome office building costing about thirty thousand dollars. The entire value of said additions and improvements at Augusta being about $325,000. The same was an outlay of unexempt funds of complainants and not stock of the Georgia Railroad and Banking Company, and was for the use and benefit of complainants, and for the same said company gets no additional consideration, but if there at the termination of the lease must pay for them aforesaid. At present said values are the property of complainants and taxable to them as aforesaid.

(*d*) In the City of Atlanta, in Fulton County, in said state, the complainants, professedly as lessees aforesaid, have erected and are operating what are known as the Atlanta Joint Terminals. The same are located partly on land leased from the Georgia Railroad and Banking Company, but partly on hand since acquired by complainants, to-wit, from the Atlanta & West Point Railroad, the freight warehouses and lot of said last named company which in 1907 adjoined that of complainants near Central Avenue; the freight house and lot near Pratt Street bounded on the south by the Georgia Railroad, on the north by Decatur Street; the terminal yards near Hulsey Station of said West Point Company; the real estate, "Y"
tracks, and terminals of said West Point Company near
29 the eastern limits of Atlanta, and all the tracks, trestles and improvements and roundhouses, turntables, machine shops, and offices of said company at Atlanta, as more fully set out in the conveyance thereof dated about April 1, 1907, from said West Point Company to complainants, the same being of an aggregate value of $57,500. From the Louisville and Nashville Railroad Company the land in Atlanta lying south of the land leased from the Georgia Railroad and Banking Company between Central Avenue, East Hunter and Washington Streets, the yard office and lot at the corner of Factory Street and said leased lands, and the land south of said leased land between Powell Street, Tennelle Street, and South Delta Place, and lots east of South Delta Place adjoining the aforemen-

tioned property of said West Point Company, all of the value of — dollars. The complainants from money borrowed by them and being taxable funds, have erected on said lands a large freight house, numerous tracks, and other buildings, increasing the value of said lands by an amount of two millions of dollars. Said terminals are not used alone by the complainants as lessees of the Georgia Railroad, but are used under a rental from complainants as such lessees also by the Atlanta and West Point Railroad Company and the Louisville and Nashville Railroad Company, who pays large sums for such use. The buildings thereon are also used largely by merchants to whom the same are rented as stores, and not for railroad purposes at all. Respondent avers and believes that the transfer of said property to complainants, and the arrangement for a joint use of said terminals by said railroads, was in no small degree induced by a purpose to screen the entire investment from taxation under the charter of the Georgia Railroad and Banking Company. Said investments, however, are as aforesaid, with the exception of the strip of land leased from the said Georgia Company, investment of funds of the complainants, loaned them by said other joint users of the terminals, in no wise exempt from taxation, and said values are taxable to the complainants as their property, and not exempt as "stock" of the Georgia Railroad and Banking Company.

(*e*) Respondents further shows that complainants have purchased and are using in connection with said railroads and terminals 68 locomotives, 69 passenger cars, 1235 box cars, 248 flat cars, 261 coal cars, 37 cab cars, 32 shanty cars, 5 wrecking cars, and one wrecking derrick, besides shop machinery and tools, all of an aggregate value of two million five hundred thousand dollars as shown by a report of the general manager of complainants to the Railroad Commission of said state. Respondent avers that said purchases were made with taxable funds of the lessees to the exemption of which the Legislature has never consented, the Georgia Railroad and Banking Company gets no increased consideration from its lease because thereof, and in the usual life of such appliances the same will long since have been worn out before the termination of said lease. Said property is not stock of said Georgia Railroad and Banking Company, but is the property of complainants and taxable as such.

(*f*) The value of stocks and bonds mentioned in the assessment exhibited, $1,348,900, is the bonds and stocks assigned in said lease to the lessee and now held by the complainant. Were said property merely leased, it would be subject to taxation as hereinbefore contended; but the same were assigned to the lessees, and vest in them, and are not protected from taxation by any exemption of the Georgia Railroad and Banking Company, both because said exemption is personal and cannot follow the property, and also because said stocks and bonds are no part of the railroads authorized by the charter of the Georgia Railroad and Banking Company, and do not represent any authorized investment of its stocks, but represent some collateral surplus investment.

Respondent therefore contends that the property assessed is tax-

able to the lessees, complainants, as a whole; but if he is in error in that contention, that each of the items before designated are taxable to complainants, and that were it not so, vast sums of taxable wealth would be covered up by an exemption limited to a stock of "not exceeding four million dollars," and to the advantage and benefit of persons who had no contract of exemption with the state, and were never intended to be benefited thereby.

Without the aid of the returns and discovery by the taxpayer provided by the tax laws, respondent is unable to be more specific than he has been regarding the details of said property and its values.

He submits that he should be left free by this Honorable
31 Court to require returns of and to fix the value of all items and classes of property held to be taxable against the complainants, under the provisions of the statutes that may be applicable.

WM. A. WRIGHT, *Respondent.*

H. A. HALL,
Attorney General of Georgia;
JNO. C. HART,
SAML. H. SIBLEY,
Of Counsel.

STATE OF GEORGIA,
County of Fulton:

Before me, an officer authorized to administer oaths, in the Northern District of Georgia, came W. A. Wright, who being duly sworn says that the foregoing answer so far as the same concerns his own act and deed is true, and so far as it concerns the acts and deeds of others he believes it to be true.

Sworn to and subscribed before me, this November 7, 1910.

[SEAL.] W. H. HARRISON,
Notary Public, Fulton County, Georgia.

Filed in Clerk's office Nov. 7th, 1910. O. C. Fuller, Clerk.

Complainants' Exceptions to Defendant's Answer.

In the Circuit Court of the United States for the Northern District of Georgia.

No. —. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WILLIAM A. WRIGHT.

And now at the next rule day after the filing of his answer by the defendant in the above stated cause, come the complainants and except to such answer.

32 1st. Because said answer sets up no defensive matter to the bill of complaint and sets up no effectual and sufficient reasons why these complainants should not have the relief sought by them in said bill.

2nd. Complainants except to the portion of said answer which is embraced in the 9th paragraph thereof upon the ground that the same is insufficient. The portion of the bill of complaint which the defendant undertakes to answer by said 9th paragraph is contained in paragraph 8 of the bill of complaint and is as follows:

"The Supreme Court of the United States having decided that the railroads aforesaid were exempt from a property tax including a so-called 'franchise tax' and that the legislation of the State of Georgia which sought to impose a tax thereon was unconstitutional, null and void; nevertheless the defendant, having failed in his persistent effort to collect taxes from the owner of the property, The Georgia Railroad & Banking Company, is now seeking to levy the same taxes on the sam- property in the hands of the tenants of the owner, to-wit, your orators as lessees, and to force your orators to pay the same."

Said answer to paragraph 8 as embodied in paragraph 9 of the answer is as follows:

"It is true that litigation with the Georgia Railroad & Banking Company over said taxes for 1903 resulted in a decree of this Court, affirmed save as to the Washington Branch by the Supreme Court of the United States, which restrained respondent from collecting from said Georgia Railroad & Banking Company ad valorem taxes on the railroad from Augusta to Atlanta, and from Union Point to Athens, in so far as the same represented investments of the stock of said company which is exempt as aforesaid. Said decree, however, involved no consideration of said lease, or of the liability of the complainants to pay taxes to the State of Georgia and the political divisions thereof, and the respondent denies that the litigation respecting the taxes due by the Georgia Railroad & Banking Company has any relevancy to the question what taxes if any these complainants are liable to pay."

33 Said answer is not fully responsive and does not definitely and precisely meet the allegations in the bill of complaint quoted above, but the same is evasive.

3rd. The 14th paragraph of said bill of complaint is as follows:

"Said lessor, The Georgia Railroad & Banking Company, has never parted with its right, title and estate in said property, or sought to do so. It has never sought to be absolved, as the owner of said railroads and their appurtenances, of its obligations to the public as a common carrier of freight and passengers, or of any of its obligations to the state and the public as a railroad company. On the contrary, since the date of the aforesaid lease to William M. Wadley, just as prior to said lease, the Georgia Railroad & Banking Company has been and is constantly used by passengers, or their legal representatives, and shippers and by persons who have been injured by the running of trains on its railroads, and in such cases, judgments, for which it alone is liable, have been rendered against it, and have been satisfied

annually for thousand of dollars. It makes no difference in the legal status that in most cases the lessees indemnify the lessor against such judgments."

The answer to these averments is found in the 15th paragraph of the defendant's answer, as follows:

"It is admitted that in leasing its railroads and franchises the Georgia Railroad & Banking Company did not and could not relieve itself from liability to the individuals of the public for any wrong use thereof by the lessees, such being the law as between such individuals and the corporation. It is denied, however, that the protection thus reserved by law to the individuals of the public has any bearing upon the liability of the complainant to pay taxes. It is also denied that the Georgia Railroad & Banking Company parted with no title or estate in said railroads nor sought to do so; but on the contrary, it is averred that in Georgia a leasehold is an estate in realty and differs from a mere tenancy under a landlord in that the exclusive and absolute right of possession and control of the term of the lease is in the lessee, with a mere estate in reversion in the lessor."

34 The following portion of this answer:

"It is also denied that the Georgia Railroad & Banking Company parted with no title or estate in said railroads nor sought to do so, but on the contrary, it is averred that in Georgia a leasehold is an estate in realty, and differs from a mere tenancy under a landlord in that the exclusive and absolute right of possession and control of the term of the lease is in the lessee, with a mere estate in reversion in the lessor," is excepted to upon the ground that the same is impertinent. This portion of the answer to the averments in the 14th paragraph of the bill of complaint is neither responsive nor germane. It has no relevancy to any issue made in the cause, and it is foreign to the complaints made in the bill of complaint and to the relief sought therein, but said part of this portion of defendant's answer undertakes to bring in extrinsic matter which is impertinent.

4th. The 17th paragraph of defendant's answer, while inadvertently stating that it is in answer to the 17th paragraph of the bill of complaint in reality is in answer to the 16th paragraph of the bill as follows:

"Your orators do not claim that the property covered by the charter of the Georgia Railroad & Banking Company which has been assessed by the defendant as per Exhibit B, is exempt from taxation. On the contrary, your orators aver that it is taxable, but in accordance with a special scheme of taxation, enacted by the wisdom of the Legislature, dealing at that date with the economic conditions and governmental problems of the day. It was never the purpose of the Legislature to relieve that company from all taxation, but to encourage an untried enterprise of great benefit, if successful, to the state. In pursuance of that purpose, the Legislature devised a system of taxation for the enterprise which it desired to foster. The principle, therefore, that immunity from taxation granted to a corporation, will not pass by a sale to another person of the corporation's property and franchises has no application in this case."

The answer in question is as follows:

35 "Answering paragraph 17, respondent says that the stipulations in the charter of the Georgia Railroad & Banking Company under which complainants seek to shield themselves, while not a total exemption from taxation, are in substance and effect a partial exemption from taxation, and subject to all the rules and restrictions applicable to exemptions from taxation. It is only because such stipulations do operate as a partial exemption from full taxation, that complainants are now seeking to invoke their protection."

The entire 17th paragraph of defendant's answer is excepted to both for insufficiency and impertinence. The same is not directly responsive to the averments in the bill which it undertakes to answer, but on the other hand, the same is irrelevant and immaterial and does not sufficiently answer the allegations of the bill. Besides, this portion of defendant's answer contains extrinsic matter which is impertinent.

5th. Paragraph 17 of the bill of complaint is as follows:

"One of the uses which the Georgia Railroad & Banking Company was authorized to make of its railroads (see section 12 of its charter) was 'to rent or farm out all or any part of their exclusive right of transportation or conveyance.' When in a subsequent section (see section 15) the special scheme of taxation applicable to this corporation was enacted, it was so enacted for the corporation which had been formed and shaped up and endowed with certain faculties by the preceding sections; and no limitation was put on the conditions and circumstances under which that scheme of taxation should operate or should cease; and there was no intimation even that the one privilege should be annulled by the exercise of another privilege granted with equal clearness."

Defendant undertakes to answer this in the 18th paragraph of his answer as follows:

"Answering paragraph 18, it is doubtful whether the Legislature, in granting permission to the Georgia Railroad & Banking Company, to 'rent or farm out all or any part of the exclusive right of transportation or conveyance' upon its roads had in contemplation such a lease as the present rather than the limited usufruct in an ordinary rental from landlord to tenant. But were it otherwise, there was no express provision that a lessee would be taxable

36 only according to the scheme provided for the lessor, and that both should be alike partially exempt, but the status of the lessee in respect of taxation was left to the principles of general law. No special contract regarding his taxation has been made by the Legislature with any lessee."

The entire 18th paragraph of defendants' answer is excepted to both for insufficiency and impertinence. The same is not directly responsive to the averments in the bill which it undertakes to answer, but on the other hand, the same is irrelevant and immaterial and does not sufficiently answer the allegations of the bill. Besides, this portion of defendant's answer contains extrinsic matter which is impertinent.

6th. After the 23rd paragraph of defendant's answer he undertakes to make a general answer as follows:

"And for further answer in this behalf respondent says:

The complainants are foreign railroad companies doing business in Georgia, and are subject to be taxed on their property in the state as other railroad companies are.

The railroads mentioned in the petition are jointly used by the complainants in connection with extended systems of railroads operated by them, and besides the traffic natural to be done by said railroads a large traffic in through transportation is done over them by virtue of their said operation as a part of said system.

The property values in respect of which respondent claims that said companies are liable to taxation in this behalf may be classified as follows:

I. Property as to which no substantial contention exists, being confessedly subject to ad valorem taxation as against someone, and which taxation the lessees in the lease agreed to pay. This includes the Macon and Augusta Railroad, and the Washington Branch Railroad, and their franchises.

II. The railroad from Augusta to Atlanta and that from Union Point to Athens and the other property referred to in the assessment exhibited in the petition, which is sought to be protected by the exemption granted to the Georgia Railroad and Banking Company.

37 This may be sub-classified as follows: (*a*) The original railroad property and franchises of The Georgia Railroad and Banking Company in the condition in which the same were delivered to the lessees in 1881. (*b*) The additions to and betterments and improvements of said property made by the lessees since said lease. (*c*) The Augusta Terminals, which were mostly constructed by the lessee since said lease. (*d*) The Atlanta Joint Terminal, mostly constructed by the lessees, and now used by them not only in connection with said railroads, but also in connection with other railroads, and for other purposes. (*e*) The rolling stock and other personal property belonging to the lessees, which was never the property of the lessor. (*f*) The bonds which were assigned to the lessees in said lease.

As to each of these sub-classes respondent alleges as follows:

(*a*) By the charter of the Georgia Railroad and Banking Company the "stock of said company" was partially exempt from taxation. This exempt stock, originally given a lower limit of $1,500,000, was finally given an upper limit of "not exceeding four million of dollars." Said sum, as respondent is informed and believes, was raised and invested in the railroads under discussion. In adding thereto, prior to said lease, said Georgia Railroad and Banking Company issued its bonds, one series for $1,000,000 maturing January 1, 1947, as at present renewed, one series for $1,200,000 maturing January 1, 1922, and one series for $300,000 maturing January 1, 1922. Said bonds were authorized by acts of the Legislature since 1863, at times when said Legislature had no power to grant irrevocable exemptions from taxation. From the sale of said bonds at par, as respondent alleges, said Georgia Railroad and Banking Company

raised the sum of $2,500,000 which was not its stock, and not exempt from taxation, and invested the same in the property afterwards leased as aforesaid. So that said property represented not only the investment of said stock, but of said unexempt funds also, and respondent avers that a value of $2,500,000 of said property was at the time of said lease, and still is taxable even as against the Georgia Railroad and Banking Company, and a fortiori against complainants.

Said railroads and franchises, in so far as they represent the investment of the stock of the Georgia Railroad and Banking Company, and so long as they are possessed and operated by said
38 company, respondent admits were taxable only according to said charter. But respondent contends that by virtue of the lease aforesaid the lessee became under the laws of Georgia invested with title to an estate in possession in said property for a term of ninety-nine years, greater in value than any life estate, and as such owners became liable to pay all taxes assessed against said property during said term without right of recourse against the owner of the reversion, especially in view of the express agreement with the owner of the reversion that such taxes should be paid by the lessees. And against said liability for taxes said lessees are not entitled to plead any exemption of the Georgia Railroad and Banking Company, the same being personal and non-assignable and no effort having been made to assign it, but said company standing without any interest whatever in the taxes which the complainants may owe.

And respondent avers that the leasehold estate itself of complainants for a term of seventy years yet, is more valuable than any life estate could be, and worth, in said leased property as unimproved, a sum of four million dollars, and that the same is in all events taxable to the complainants.

(*b*) But said railroads so leased were at the time of the lease poorly equipped, laid with light iron, unballasted, and with deficient depots and terminals. Since said lease the complainants and their predecessors as lessees have made large additions and improvements. In almost every county through which said railroads pass additional right of way has been acquired, additional side tracks laid, new stations established with side tracks and depots, and new depots built at old stations. The main tracks have been relaid with steel of nearly double the weight of the former rails, and the track ballasted with rock and other substances. New steel bridges instead of former wooden ones have been erected across the Oconee River at Athens and Carey, and across the Yellow and Alcovy Rivers. All said additions and improvements have been made with funds of the complainants, and for their advantage and benefit in the enjoyment of their leasehold estate. Said funds so invested were not exempt from taxation, and the Legislature has never attempted to consent to their withdrawal by such investment from taxation. The Georgia Railroad and Banking Company paid nothing toward said improvements, gets no increased consideration by reason
39 thereof, and should any of them remain at the end of the lease, would under its terms have to make compensation for and purchase the same.

For the present said values are the property of complainants and the increased value of said railroads by reason thereof, which respondent avers to be about four million dollars, is taxable to said lessees. Such would be the case were there no stipulation thereabouts in the lease, and especially so when it is stipulated that the lessees shall pay all taxes on the property.

(*c*) In Augusta, Richmond County, Georgia, complainants have purchased since said lease additional lands to those leased, and on them and on such leased land have laid out extensive track yards and constructed many tracks. They have also built a large freight depot, costing about fifty thousand dollars, and a handsome office building costing about thirty thousand dollars. The entire value of said additions and improvements at Augusta being about $325,000. The same was an outlay of unexempt funds of complainants and not stock of the Georgia Railroad and Banking Company, and was for the use and benefit of complainants, and for the same said company gets no additional consideration, but if there at the termination of the lease must pay for them as aforesaid. At present said values are the property of complainants and taxtable to them as aforesaid.

(*d*) In the City of Atlanta, in Fulton County, in said state the complainants, professedly as lessees aforesaid, have erected and are operating what are known as the Atlanta Joint Terminals. The same are located partly on land leased from the Georgia Railroad and Banking Company, but partly on land since acquired by complainants, to-wit, from the Atlanta & West Point Railroad, the freight warehouse and lot of said last named company which in 1907 adjoined that of complainants near Central Avenue; the freight house and lot near Pratt Street bounded on the south by the Georgia Railroad, on the north by Decatur Street; the terminal yards near Hulsey Station of said West Point Company; the real estate, "Y" tracks, and terminals of said West Point Company near the eastern limits of Atlanta, and all the tracks, trestles and improvements and roundhouses, turntables, machine shops, and offices of said company at Atlanta, as more fully set out in the conveyance
40 thereof dated about April 1, 1907, from said West Point Company to complainants, the same being of an aggregate value of $57,500. From the Louisville and Nashville Railroad Company the land in Atlanta lying south of the land leased from the Georgia Railroad and Banking Company between Central Avenue, East Hunter and Washington Streets, the yard office and lot at the corner of Factory Street and said leased lands, and the land south of said leased land between Powell Street, Tennelle Street, and South Delta Place, and lots east of South Delta Place adjoining the afore-mentioned property of said West Point Company, all of the value of — dollars. The complainants from money borrowed by them and being taxable funds, have erected on said lands a large freight house, numerous tracks, and other buildings, increasing the value of said lands by an amount of two millions of dollars. Said terminals are not used alone by the complainants as lessees of the Georgia Railroad, but are used under a rental from complainants

as such lessees also by the Atlantic and West Point Railroad Company and the Louisville and Nashville Railroad Company, who pay large sums for such use. The buildings thereon are also used largely by merchants to whom the same are rented as stores, and not for railroad purposes at all. Respondent avers and believes that the transfer of said property to complainants, and the arrangement for a joint use of said terminals by said railroads, was in no small degree induced by a purpose to screen the entire investment from taxation under the charter of the Georgia Railroad and Banking Company. Said investments, however, are as aforesaid, with the exception of the strip of land leased from the said Georgia Company, investments of funds of the complainants, loaned them by said other joint users of the terminals, in no wise exempt from taxation, and said values are taxable to the complainants as their property, and not exempt as "stock" of the Georgia Railroad and Banking Company.

(*e*) Respondent further shows that complainants have purchased and are using in connection with said railroads and terminals 68 locomotives, 69 passenger cars, 1235 box cars, 248 flat cars, 261 coal cars, 37 cab cars, 32 shanty cars, 5 wrecking cars, and one wrecking derrick, besides shop machinery and tools, all of an aggregate value of two million five hundred thousand dollars
41 as shown by a report of the general manager of complainants to the Railroad Commission of said state. Respondent avers that said purchases were made with taxable funds of the lessees to the exemption of which the Legislature has never consented, the Georgia Railroad and Banking Company gets no increased consideration from its lease because thereof, and in the usual life of such appliances the same will long since have been worn out before the termination of said lease. Said property is not stock of said Georgia Railroad and Banking Company, but is the property of complainants and taxable as such.

(*f*) The value of stocks and bonds mentioned in the assessment exhibited, $1,348,900, is the bonds and stocks assigned in said lease to the lessee and now held by the complainant. Were said property merely leased, it would be subject to taxation as hereinbefore contended; but the same were assigned to the lessees, and vest in them, and are not protected from taxation by any exemption of the Georgia Railroad and Banking Company, both because said exemption is personal and cannot follow the property, and also because said stocks and bonds are no part of the railroads authorized by the charter of the Georgia Railroad and Banking Company, and do not represent any authorized investment of its stock, but represent some collateral surplus investment.

Respondent therefore contends that the property assessed is taxable to the lessees, complainants, as a whole; but if he is in error in that contention, that each of the items before designated are taxable to complainants, and that were it not so, vast sums of taxable wealth would be covered up by an exemption limited to a stock of "not exceeding four million dollars," and to the advantage and

benefit of persons who had no contract of exemption with the state, and were never intended to be benefited thereby.

Without the aid of returns and discovery by the taxpayer provided by the tax laws, respondent is unable to be more specific than he has been regarding the details of said property and its values. He submits that he should be left free by this Honorable Court to require returns of and to fix the value of all items and classes of property held to be taxable against the complainants, under the provisions of the statutes that may be applicable."

42 All of this portion of the defendant's answer is excepted to. It is neither responsive nor germane to any of the allegations in complainants' bill and it sets up no matter which offers defense, or which tends to avoid, in whole or in part, the averments and charges in the bill of complaint, but this portion of the answer is entirely outside of the cause and relates to matters and contains averments which bear no relation to the assessment made by the defendant, the attack made upon the assessment by these complainants, and does not directly or remotely affect the relief sought by these complainants. Certain acts of the defendant are charged to be illegal and inequitable by these complainants and relief from his act of levying the tax assessment referred to in the bill of complaint and annexed to said bill of complaint as an exhibit is sought.

The defendant in the portion of the answer now excepted to makes statements which have no reference or bearing upon the assessment in question and offer no reasons whatever why these complainants should not be relieved against such assessment, but the portion of the answer excepted to consists of extrinsic matters without relation to the cause, and this portion of the defendant's answer is therefore impertinent.

7th. The following portion of the defendant's answer is excepted to:

"And respondent avers that the leasehold estate itself of complainants, for a term of seventy years yet, is more valuable than any life estate could be, and worth, in said leased property as unimproved, a sum of four million dollars, and that the same is in all events taxable to the complainants."

Said part of the answer excepted to is wholly irrelevant. Complainants' bill seeks to enjoin the execution of respondent's avowed purpose to levy a tax on property itself, valued at about sixteen million dollars. This is the single and sole scope of the assessments made by respondent, preliminary to the issue and levy of tax executions on the whole property. Respondent by the part of the answer now excepted to sets up a new and wholly inconsistent ground of taxation and a totally different subject of taxation, to-wit, an alleged leasehold estate, alleged to be worth four million dollars.

Wherefore, these complainants pray that their exception to
43 the answer as a whole be considered and that the said answer be stricken from the files.

Said complainants further pray that their exceptions to the several portions of the answer be considered seriatim and that such por-

tions of the answer as are excepted to be stricken and expunged therefrom.

JOS. B. & BRYAN CUMMING,
McDANIEL, ALSTON & BLACK,
Complainants' Solicitors.

I, Sanders McDaniel, being of counsel for the complainants in the above styled cause, do certify that in my opinion, the foregoing exceptions to the defendant's answer are well founded in law.

SANDERS McDANIEL.

U. S. Circuit Court.

Filed in clerk's office Dec. 3, 1910. O. C. Fuller, Clerk.

Amendment to Answer of the Defendant.

In the Circuit Court of the United States for the Northern District of Georgia.

In Equity.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WILLIAM A. WRIGHT.

And now, upon the refusal of the Court to permit the City of Atlanta, and County of Fulton, and County of Clarke to intervene for their several protection, comes the defendant any [and] by leave of the Court amends the answer in said case and alleges the following facts:

The Atlanta Terminals mentioned in the assessment exhibited, and in the answer, embrace the system of tracks, freight depots, round houses, repair shops, coaling stations and other ter-
44 minal facilities erected and maintained in the City of Atlanta and County of Fulton, extending from Central Avenue between Decatur Street on the North and East Hunter Street and Oakland Cemetery on the south, eastwardly to the city limits.

The lands whereon the same are constructed are in part land leased from the Georgia Railroad and Banking Company as alleged in the petition, and in part land transferred and conveyed by the Atlanta and West Point Railroad Company to complainants in the year 1908, and from the complainant Louisville and Nashville Railroad Company and the Louisville Property Company, to complainants in said year 1908.

Prior to April 1, 1907, complainants as lessees as set out in the petition, and the Atlanta and West Point Railroad Company and the Louisville & Nashville Railroad Company in respect of its separate railroad business conceived the plan of uniting to construct

and maintain for their joint use terminal facilities in Atlanta, and to this end on said date they agreed together in writing that the complainants should "appropriate, yield, devote and turn over for the accomplishment of said purpose" such of their leased property as was within said named limits, and that the Atlanta and West Point Railroad Company should convey and transfer its property, rights and terminal facilities adjoining, and within said limits, and that the Louisville and Nashville Railroad Company should convey and procure to be conveyed other adjoining property therein mentioned and within the limits aforesaid; the whole to be used as a joint terminal by them, and to be under their joint control, and to continue as such until the expiration of the lease of complainants mentioned in the petition on April 1, 1980. And the said Louisville and Nashville Railroad Company further agreed to furnish needed funds to construct, rearrange, and improve said aggregated terminals.

In pursuance of said agreement said lands were so appropriated and conveyed, title to those conveyed being placed in complainants, for the purpose as defendant believes, of seeking to shelter the whole from taxation as is now attempted in this case. And funds of the Louisville and Nashville Railroad Company to the amount of about two millions of dollars were expended in the rearranging, relaying and building of tracks, erecting round houses and repair shops, depots, unloading cranes, coal stations, over-passes and under-passes for streets, and otherwise improving said property.

While the most valuable part of said erections, and especially the new freight depots are upon the lands deeded as aforesaid to complainants, the whole was intended to be and is an industrial unit, deriving its value largely from the connection of the parts with the whole, and their adaptation to the purpose of a joint terminal for the business of said railroads.

Under the terms of said agreement of April 1, 1907, the said joint users control said entire property by a board of control therein provided for, consisting of their several general managers. They pay in proportion to their several use of said terminals the interest on the money advanced as aforesaid by the Louisville and Nashville Railroad Company for the building and acquisition of said terminals, the expense of maintaining and operating them, liabilities for personal injury thereat, and agree so to pay the taxes thereon; and no alteration in the premises can be made except by the consent of all. Switch engines for the work are also contributed in proportion to their use of them. Said terminals are to all intents and purposes a separate partnership enterprise.

Nor are said terminals used wholly for railroad purposes, but said board of control has rented out large portions of the buildings erected as aforesaid to wholesale grocery merchants and others for purposes of trade.

Said Joint Terminal is in no sense any part of the "stock" of the Georgia Railroad and Banking Company, but is constructed largely

on lands to which that company never had title, and the value of the whole is produced almost entirely by the expenditure of taxable funds of corporations having no such exemption from taxation as the Georgia Railroad and Banking Company have. Said Georgia Railroad and Banking Company receives no part of the income or benefit therefrom in increased consideration for said lease, nor would a taxation of said company according to its charter tax the income or use of this recently constructed improvement. Said company will have no interest in the income or enjoyment of said Joint Terminal until, if the same is in existence at the termination of said lease, and is regarded within its terms, it pays the value of the betterment to its then owners under the terms of said lease.

Nor is the taxation thereof to the complainants any hard-
46 ship or surprise upon any persons interested therein, for in said agreement of April 1, 1907, it was expressly covenanted as follows:

"Taxes, county, state and municipal and all other rates or levies lawfully imposed on the terminal property, shall be paid by the lessees (complainants); and when so paid, bills for their respective proportions shall be rendered to the West Point Company and the Louisville Company." * * *

Respondent shows that with respect to the branch railroad from Athens to Union Point mentioned in the assessment exhibited in the petition, one mile at the Athens end, together with the depots, side tracks, and other property appurtenant thereto in Athens, Clarke County, as they existed in 1910, were and are *not* a part of the property leased by complainants from the Georgia Railroad and Banking Company.

At the time of said lease in 1881, said branch road terminated at a point east of Oconee River and Trail Creek, and about one mile east of the present terminus in Athens. After said lease, in the year 1882, the lessees at the time, being the Louisville and Nashville Railroad Company, and the predecessor in interest of the Atlantic Coast Line Co., undertook to extend said track into the City of Athens, and acquired necessary lands for track, side tracks, depots, and other terminal facilities in said city, and built said track westward one mile, erecting costly bridges over said Trail Creek, and the Oconee River, and erecting depots, turntable, side tracks, and other terminal facilities in said City of Athens between Broad Street and the Oconee River.

While title to said lands was taken in the name of the Georgia Railroad and Banking Company, as respondent is informed, the cost thereof, and of the erections aforesaid being a sum of three hundred thousand dollars, was entirely borne by said lessees; the title being taken as it was for the purpose of shielding the property from taxation.

Said property so acquired and improved is included in the valuation assessed against said branch railroad set out in the petition.

There is erected thereon also two warehouses and two dwelling houses, fronting on Broad Street in said City of Athens, which are

not used by complainants for railroad purposes, but are
47 rented out to others, being of the value of about four thousand dollars.

None of said property at Athens is "stock" of the Georgia Railroad and Banking Company, but represents taxable funds of the lessees as aforesaid. The Georgia Railroad and Banking Company gets no additional consideration as lessor therefor, and has no interest therein beneficially, and will not have until if the same is in existence at the termination of the lease as a betterment said — pays therefor under the terms of said lease.

The complainants on the other hand are in the actual possession and enjoyment thereof, paying the lessor nothing therefor, and reaping not only all the saving and convenience and business advantage of said constructions, but receiving also the additional freight and passenger tariffs allowed for the additional distance of said one mile. And at the termination of said lease, if said constructions are still in existence as betterments, said complainants will be entitled to be paid therefor.

And respondent avers that said investment in Athens is taxable to said complainants, and he should not be enjoined from proceeding with the assessment against the same.

GEORGIA,
Fulton County:

You, William A. Wright, do swear that the details of fact set out in the foregoing amendment were unknown to you at the time of filing the original answer, and the facts stated in said amendment so far as they concern your own act and deed are true, and so far as they concern the act and deed of others you believe them to be true, so help you God.

WM. A. WRIGHT.

Sworn to and subscribed before me, this July 3, 1911.
[SEAL.] W. H. HARRISON,
Notary Public, Fulton County, Georgia.

Filed in clerk's office July 5th, 1911. O. C. Fuller, Clerk.

48 *Order Allowing Amendment.*

This amendment allowed, subject to exceptions.
July 5th, 1911.

WM. T. NEWMAN,
U. S. Judge.

Complainants' Exceptions to Defendant's Amended Answer.

In the Circuit Court of the United States for the Northern District of Georgia.

In Equity. No. 1323.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WILLIAM A. WRIGHT.

And now in the above stated cause come the complainants, The Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company, and refile to the answer of the defendant as now amended each and every one of the exceptions heretofore filed by them to the said answer of the said defendant, and by reference to such exceptions hereby repeat the same to each and every part of said answer as in said former exceptions specified other than the portion of said answer contained in the amendment filed and allowed subject to exception, on July 5, 1911.

In addition to said exceptions above mentioned, complainants present the following exceptions to the portion of said answer contained in said amendment of July 5, 1911:

1st. Complainants except to all of said amendment to said answer because the same presents matter which is impertinent and irrelevant as matter of answer to any of the matters and things set forth in the complainant's bill of complaint filed in this cause and they pray that the said amendment be for this reason disallowed and that said exception thereto be sustained.

49 2nd. Complainants except to the following portion of said amendment of July 5, 1911:

"The Atlanta Terminals mentioned in the assessment exhibited and in the answer embrace the system of tracks, freight depots, round houses, repair shops, coaling stations and other terminal facilities erected and maintained in the City of Atlanta and County of Fulton, extending from Central Avenue between Decatur Street on the north and East Hunter Street and Oakland Cemetery on the south, eastwardly to the city limits.

The lands whereon the same are constructed are in part land leased from the Georgia Railroad and Banking Company as alleged in the petition, and in part land transferred and conveyed by the Atlanta and West Point Railroad Company to complainants in the year 1908, and from the complainant, Louisville and Nashville Railroad Company, and the Louisville Property Company to complainants in said year 1908."

(a) Because the same is not responsive to any matter or thing contained in complainants' bill of complaint.

(b) Because the same is insufficient in that it doth not designate any part of said lands as being other than property leased from the

Georgia Railroad and Banking Company as alleged in said petition; so that the complainants can properly either reply thereto or set the same down with the bill for argument as to its sufficiency in law.

3rd. Complainants further except to the following portion of said amendment to said answer, to-wit:

"Prior to April 1, 1907, complainants as lessees as set out in the petition, and the Atlanta and West Point Railroad Company, and the Louisville and Nashville Railroad Company, in respect of its separate railroad business conceived the plan of uniting to construct and maintain for their joint use terminal facilities in Atlanta, and to this end on said date they agreed together in writing that the complainants should 'appropriate, yield, devote and turn over for the accomplishment of said purpose' such of their leased property as was within said named limits, and that the Atlanta and West Point Railroad Company should convey and transfer its
50 property, rights and terminal facilities adjoining and within said limits, and that the Louisville and Nashville Railroad Company should convey and procure to be conveyed other adjoining property therein mentioned and within the limits aforesaid; the whole to be used as a joint terminal by them, and to be under their joint control, and to continue as such till the expiration of the lease of complainants mentioned in the petition on April, 1980. And the said Louisville and Nashville Railroad Company further agreed to furnish needed funds to construct, rearrange and improve said aggregated terminals.

In pursuance of said agreement said lands were so appropriated and conveyed, title to those conveyed being placed in complainants, for the purpose as defendant believes, of seeking to shelter the whole from taxation as is now attempted in this case, and funds of the Louisville and Nashville Railroad Company to the amount of two millions of dollars were expended in the rearranging, relaying and building of tracks, erecting round-houses and repair shops, depots, unloading cranes, coal stations, over-passes and under-passes for streets and otherwise improving said property;"

(*a*) Because the same is matter wholly impertinent and irrelevant to any matter or thing pleaded in the said bill of complaint and is not responsive thereto.

(*b*) Because the same does not set up matter responsive to said bill of complaint, but matter which, if relevant at all, is the proper subject matter of cross-bill.

(*c*) Because the same is wholly insufficient in averment to be either replied to by these complainants and is so indefinite that it cannot be set down with the bill to be submited as insufficient matter of law.

4th. Complainants except to the following portion of said amendment to said answer, to-wit:

"While the most valuable part of said erections and especially the new freight depots are upon the lands deeded as aforesaid to complainants, the whole was intended to be and is an industrial unit,

deriving its value largely from the connection of the parts
51 with the whole, and their adaptation to the purpose of a joint terminal for the businesses of said railroads;"

and for grounds of exception they repeat each and every one of the exceptions heretofore made under exceptions 2 and 3 hereof.

5th. Complainants except to the following portion of said amendment to answer, to-wit:

"Under the terms of said agreement of April 1, 1907, the said joint users control said entire property by a Board of Control therein provided for, consisting of their several general managers. They pay in proportion to their several use of said terminals the interest on the money advanced as aforesaid by the Louisville & Nashville Railroad Company for the building and acquisition of said terminals, the expense of maintaining and operating them, liabilities for personal injury thereat, and agree so to pay the taxes thereon; and no alteration in the premises can be made except by the consent of all. Switch engines for the work are also contributed in proportion to their use of them. Said terminals are to all intents and purposes a separate partnership enterprise.

Nor are said terminals used wholly for railroad purposes, but said Board of Control has rented out large portions of the buildings erected as aforesaid to wholesale grocery merchants and others for purposes of trade;"

and for exception they repeat each and every one of the exceptions heretofore made under exceptions 2 and 3 hereof.

6th. Complainants except to the following portion of said amendment to said answer, to wit:

"Said Joint Terminal is in no just sense any part of the 'stock' of the Georgia Railroad and Banking Company, but is constructed largely on lands to which that company never had title, and the value of the whole is produced almost entirely by the expenditure of taxable funds of corporations having no such exemption from taxation as the Georgia Railroad and Banking Company had. Said Georgia Railroad and Banking Company receives no part of
52 the income or benefit therefrom in increased consideration for said lease, nor would a taxation of said company according to its charter tax the income or use this recently constructed improvement. Said company will have no interest in the income or enjoyment of said Joint Terminal until, if the same is in existence at the termination of said lease, and is regarded within its terms, it pays the value of the betterment to its then owners under the terms of said lease;"

and for grounds of exception they repeat each and every one of the exxceptions heretofore made under exceptions 2 and 3 hereof.

7th. Complainants except to the following part of the amendment to the answer of July 5, 1911, as follows:

"Nor is the taxation thereof to the complainants any hardship or surprise upon any person interested therein, for in said agreement of April 1, 1907, it was expressly covenanted as follows:

"Taxes, county, state and municipal, and all other rates or levies lawfully imposed on the terminal property shall be paid by the lessees (complainants); and when so paid, bills for their respective proportions shall be rendered to the West Point Company and the Louisville Company;"

for that the above portion of said answer is not responsive to any matter or thing contained in said bill of complaint; that the same is immaterial, irrelevant and impertinent to any issue made between complainants and defendant in this cause.

8th. Complainants except to the following portion of said amendment to said answer, to wit:

"Respondent shows that with respect to the branch railroad from Athens to Union Point mentioned in the assessment exhibited in the petition, one mile at the Athens end, together with the depots, side tracks and other property appurtenant thereto in Athens, Clarke County, as they existed in 1910, were and are not a part of the property leased by complainants from the Georgia Railroad and
53 Banking Company.

At the time of said lease in 1881 said branch road terminated at a point east of Oconee River and Trail Creek, and about one mile east of the present terminus in Athens. After said lease, in the year 1882, the lessees at the time being the Louisville and Nashville Railroad Company and the predecessor in interest of the Atlantic Coast Line Company, undertook to extend said track into the City of Athens and required necessary lands for track, side tracks, depots and other terminal facilities in said city, and built said track westward one mile erecting costly bridges over said Trail Creek and the Oconee River, and erecting depots, turntable, side tracks and other terminal facilities in said City of Athens between Broad Street and the Oconee River.

While title to said land was taken in the name of the Georgia Railroad and Banking Company, as respondent is informed, the cost thereof and of the erections aforesaid being a sum of three hundred thousand dollars, was entirely borne by said lessee; the title being taken as it was for the purpose of shielding the property from taxation.

Said property so acquired and improved is included in the valuation assessed against said branch railroad as set out in the petition.

There is erected thereon also two warehouses and two dwelling houses, fronting on Broad Street in said City of Athens, which are not used by complainants for railroad purposes, but are rented out to others, being of the value of about four thousand dollars.

None of said property at Athens is 'stock' of the Georgia Railroad and Banking Company, but represents taxable funds of its lessees as aforesaid. The Georgia Railroad and Banking Company gets no additional consideration as lessor therefor and has no interest therein beneficially, and will not have until if the same is in existence at the termination of the lease as a betterment said lessor pays therefor under the terms of said lease.

The complainants on the other hand are in the actual possession

and enjoyment thereof, paying the lessor nothing therefor, and reaping not only all the saving and convenience and business, advantage of said constructions, but receiving also the additional freight and passenger tariffs allowed for the additional distance of
54 said one mile. And at the termination of said lease, if said constructions are still in existence as betterments, said complainants will be entitled to be paid therefor.

And respondent avers that said investment in Athens is taxable to said complainants, and he should not be enjoined from proceeding with the assessment against the same;"

and for grounds of exceptions they repeat each and every one of the exceptions heretofore made under exceptions 2 and 3 hereof.

Wherefore, these complainants pray that their exceptions to the said answer as amended, both as a whole, and to the several parts thereof be considered; that the said answer as a whole be stricken from the files and that the exceptions to the several portions thereof be considered seriatim, and that such portions of the answer as are excepted to be stricken and expunged therefrom.

J. B. & BRYAN CUMMING,
McDANIEL & BLACK,
R. C. & P. H. ALSTON,
TYE, PEEPLES & JORDAN,
KING & SPALDING AND UNDERWOOD,
Complainants' Solicitors.

I, Alex C. King, being of counsel for the complainants in the above styled cause, do certify that, in my opinion, the foregoing exceptions to the defendant's answer are well founded in law.

ALEX. C. KING,
Of Counsel for Complainants.

Filed in clerk's office, 13th day of June, 1911. O. C. Fuller, clerk. By J. D. Steward, deputy.

55 *Opinion of Court on Exceptions to Answer.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. 1323. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WILLIAM A. WRIGHT.

This case is now being heard on exceptions to the answer. The Complainants, the two railroad companies on September 24th, 1910, filed their bill in this Court seeking to enjoin the defendant, acting

as Comptroller General of the State of Georgia, from collecting from the complainants taxes on the property leased by them from the Georgia Railroad & Banking Company. The defendant filed his answer November 7th, 1911.

By Section 15 of the Charter of the Georgia Railroad & Banking Company, granted December 27th, 1831, "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investment."

On the 7th of May, 1881, the Georgia Railroad & Banking Company leased the property in question to William M. Wadley and his assigns. By various conveyances the complainant railroad companies became successors of the said Wadley as lessees of said railroad property and have been for many years operating the same under this lease.

The defendant, as Comptroller General of the State of Georgia, is now seeking to collect the ad valorem taxes levied by the State of Georgia on other property from the defendants on the leased property. The answer set up in substance that this property is subject to taxation as is other property in Georgia, and that the scheme of taxation provided in the charter of the Georgia Railroad & Banking Company does not apply to the property in the hands of these lessees.

There are a number — exceptions which will be dealt with in their order.

56 The first exception is: "Because said answer sets up no defensive matter to the bill of complaint and sets up no effectual and sufficient reason why these complainants should not have the relief sought by them in said bill."

Undoubtedly, this exception is not good. It is clearly settled by the authorities that the merits in the case will not be considered on exceptions to the answer. In Walker, et al., vs. Jack, 88 Fed., 576, in the opinion of the Circuit Court of Appeals, by Judges Taft, Lurton and Severens, Judge Taft delivering the opinion, the following language pertinent to this question is used:

The complainant excepted to the answer for insufficiency; the Court sustained the exception and the defendants declining to plead further, the Court entered a decree perpetually enjoining the defendants as prayed in the bill. The Court seems to have treated the exception as if equivalent to a demurrer testing the sufficiency of the averments of the answer as a defense to the bill upon its merits. This was not according to proper equity practice. There is no such thing as a demurrer to an answer in equity. Grether vs. Cornell's Ex'rs, 43 U. S. App., 770, 23 C. C. A. 498, and 75 Fed., 742. The only way by which the sufficiency of an answer on its merits as a defense to the case made in the bill can be tested is by setting the case for hearing on the bill and answer. The office of an exception is to raise the question whether the averments and denials of the answer are sufficiently responsive to the allegations of the bill. In this

case the averments of the answer were in every way responsive to the allegations of the bill, and left nothing to be desired in defining the sharpness of the real issue between the parties. It was therefore an error to sustain the exceptions."

See also 16th Cyc., 315.

The second exception is this: "Complainants except to the portion of said answer which is embraced in the 9th paragraph thereof, upon the ground that the same is insufficient. The portion of the bill of complaint which the defendant undertakes to answer by said 9th paragraph is contained in paragraph 8 of the bill of complaint and is as follows:

57 " 'The Supreme Court of the United States having decided that the railroads aforesaid were exempt from a property tax including a so-called 'franchise tax,' and that the legislation of the State of Georgia which sought to impose a tax thereon was unconstitutional, null and void; nevertheless, the defendant having failed in his pr*e*sistent [persistent] effort to collect taxes from the owner of the property, The Georgia Railroad & Banking Company, is now seeking to levy the same taxes on the same property in the hands of the tenant of the owner, to wit, your orators as lessees and to force your orator- to pay the same.'

"Said answer to Paragraph 8 as embodied in Paragraph 9 of the answer is as follows:

" 'It is true that litigation with the Georgia Railroad & Banking Company over said taxes for 1903 resulted in a decree of this Court, affirmed save as to the Washington Branch by the Supreme Court of the United States, which restrained respondent from collecting from said Georgia Railroad & Banking Company ad valorem taxes on the railroad from Augusta to Atlanta, and from Union Point to Athens, in so far as the same represented investments of the stock of said company which is exempt as aforesaid. Said decree, however, involved no consideration of said lease or of the liabilty of the complanants to pay taxes to the State of Georgia and the political divisions thereof, and the respondent denies that the litigation respecting the taxes due by the Georgia Railroad & Banking Company has any relevancy to the question what taxes if any these complainants are liable to pay.'

"Said answer is not fully responsive and does not definitely and precisely meet the allegations in the bill of complaint quoted above, but the same is evasive."

Ths portion of th answer is sufficiently responsive.

The third exception stated is: "The 14th paragraph of said bill of complaint is as follows:

" 'Said lessor, The Georgia Railroad & Banking Company, has never parted with its right, title and estate in said property
58 or sought to do so. It has never sought to be absolved, as the owner of said railroads and their appurtenances, of its obligation to the public as a common carrier of freight and passengers, or any of its obligations to the state and the public as a railroad company. On the contrary, since the date of the aforesaid lease to William M. Wadley, just as prior to said lease, the Georgia Railroad

& Banking Company has been and is constantly sued by passengers or their legal representatives and shippers, and by persons who have been injured by the running of the trains on its railroads, and in such cases, judgments for which it alone is liable, have been rendered against it and have been satisfied annually for thousands of dollars. It makes no difference in the legal status that in most cases the lessees indemnify the lessor against such judgment.'

"The answer to these averments is found in the 15th paragraph of the defendant's answer, as follows:

"'It is admitted that in leasing its railroads and franchises the Georgia Railroad & Banking Company did not and cold not relieve itself from liability to the individuals of the public for any wrong use thereof by the lessees, such being the law as between such individuals and the corporation. It is denied, however, that the protection thus reserved by the law to the individuals of the public has any bearing upon the liability of the complainants to pay taxes. It is also denied that the Georgia Railroad & Banking Company parted with no title or estate in said railroads nor sought to do so; but on the contrary, it is averred that in Georgia a leasehold is an estate in realty, and differs from a mere tenancy under a landlord in that the exclusive and absolute right of possession and control of the term of the lease is in the lessee with a mere estate in reversion in the lessor."

"The following portion of this answer:

"'It is also denied that the Georgia Railroad & Banking Company parted with no title or estate in said railroads nor sought to do so; but on the contrary, it is averred that in Georgia a leasehold is an estate in realty and differs from a mere tenancy under a landlord in that the exclusive and absolute right of possession
59 and control of the term of the lease is in the lessee with a mere estate in reversion in the lessor.'

is excepted to upon the ground that the same is impertinent.

This portion of the answer to the averments in the 14th paragraph of the bill of complaint is neither responsive nor germane. It has no relevancy to any issue made in the cause and it is foreign to the complaints made in the bill of complaint and the relief sought therein, but said part of this portion of defendant's answer undertakes to bring extrinsic matter which is impertinent."

The part of answer excepted to can hardly be considered as impertinent. Perhaps it goes somewhat beyond what was necessary by way of response to complainants' averments, but hardly justifies the Court in sustaining an exception to it. The 18th paragraph of defendant's answer which is in response to Paragraph 17 of the bill is excepted to both for insufficiency and impertinence. Both this paragraph of the bill and of the answer seem to me rather argumentative concerning the section of the charter authorizing the Georgia Railroad & Banking Company to "rent or farm out all or any part of their exclusive right of transportation or conveyance," but in view of the character and general subject matter of the bill and answer, I do not find the answer to be so insufficient or impertinent as to justify striking it on exception.

The exception which is most strenuously urged is to that part of the answer suc-eeding Paragraph 23. That portion of the answer sets up if the entire property taken over and operated by the complainant companies, under the lease, is not subject to ad valorem taxation, certain specific items of property are so subject. As to some of these items there is no dispute whatever between the parties. These need not be mentioned.

It is claimed first that the proceeds of certain bonds issued by the Georgia Railroad & Banking Company and still outstanding from which it realized and invested in the property afterwards leased to complainants, the sum of $2,500,000, is not its stock and not exempt from taxation. It is further set up in the answer that the value of this $2,500,000 of railroad property was at the
60 time of the lease and still is taxable, even against the Georgia Railroad & Banking Company and a fortiori against complainants.

There is also the general claim that the effect of the ninety-nine year lease from the Georgia Railroad & Banking Company to the complainants was to vest an estate in the property in the lessee companies, and that estate is subject to taxation.

It is further claimed in the answer that the railroads as leased were laid with light iron, unballasted, with deficient depots and terminals, and since the lease that these lessees and their predecessors have made large additions and improvements, that additional right of way has been acquired, additional side tracks laid and new stations established, that the main tracks have been relaid with steel of nearly double the weight of the former rails and much better ballasted, new steel bridges erected instead of the former wooden ones, that all these additions and improvements have been made with the funds of the complainants and for their advantage and benefit in the enjoyment of their leasehold estate. That the Georgia Railroad & Banking Company has paid nothing towards these improvements and gets no increased consideration therefor, and should any remain at the end of the lease it would, under the terms of the lease, have to make compensation for and purchase the same. That the present values are the property of complainants and the increased value of said railroad by reason thereof is taxable to the lessees. Certain extensive improvements made in Augusta and Atlanta are claimed to be especially subject to taxation as against the lessees. Also that a large amount of rolling stock has been purchased by the lessees since their possession of the road which is of large value, and is the property of the complainants and subject to taxation. That the value of certain stocks and bonds mentioned in the assessment exhibits, aggregating $1,348,900 are the stocks and bonds assigned in said lease and now held by complainants. Said stock and said bonds, it is claimed, were not a part of the railroads authorized by the charter to the Georgia Railroad & Banking Company, and do not represent any authorized investment of its stock, but represent some collateral surplus investment. The answer then proceeds in this language:

"Respondent, therefore, contends that the property assessed
61 is taxable to the lessees, complainants, as a whole; but if he is in error in that contention, that each of the items before designated are taxable to complainants, and that, were it not so, vast sums of taxable wealth would be covered up by an exemption limited to a stock of 'not exceeding four million dollars,' and to the advantage and benefit of persons who had no contract of exemption with the state, and were never intended to be benefitted thereby."

The exception to the fact of the answer above referred to is that "it is neither responsive nor germane to any of the allegations in the bill and it sets up no matter which offers defense or which tends to avoid, in whole or in part, the averments and charges in the bill of complaint, but this portion of the answer is entirely outside of the cause and relates to matters and contains averments which bear no relation to the assessment made by the defendant, the attack made upon the assessment by these complainants, and does not directly or remotely effect the relief sought by these complainants. Certain acts of the defendant are charged to be illegal and inequitable by these complainants and relief from his act in levying the tax assessment referred to in the bill of complaint and annexed to the bill of complaint as an exhibit is sought. The defendant in the portion of the answer now excepted to, makes statements which have no reference or bearing upon the assessment in question and offer no reason whatever why these complainants should not be relieved against such assessment, but the portion of the answer excepted to consists of extrinsic matters without relation to the cause, and this portion of the defendant's answer is therefore impertinent."

The assessment of the Comptroller General is:

"The railroad from Barnett to Washington and realty connected therewith at $222,453, the franchise thereof at $1,800 and rolling stock and all other personal property connected therewith at $15,747.

"The railroad from Augusta to Atlanta and from Union Point to Athens and realty connected therewith, exclusive of terminals separately assessed below at $6,736,748; the franchise thereof at
62 $2,527,436 and the rolling stock and all other personal property in connection therewith including stocks and bonds valued at $1,348,900 at $3,891,436.

"The tracks, buildings and other property at Atlanta known as Atlanta Joint Terminals, at $2,813,786.

"The tracks and buildings and other property at Augusta known as the Augusta Terminals at $325,000."

The question argued at the bar on the last exception mentioned is whether the defendant may by his answer claim that even if it be determined that certain parts of the property assessed (which would mainly consist of the main line of the road from Augusta to Atlanta and from Union Point to Athens and its equipment, its franchises, depots, etc.) are not subject to taxation, yet certain other things (mainly the proceeds of certain stocks and bonds, the enhanced value of the property in the hands of the lessees by reason of improvements placed thereon by such lessees and the terminals at Atlanta and Augusta) are subject.

The prayers of the bill are:

"First. That it be adjudged that your orators are not or either of them, chargeable with taxes or any part of them on the property included in the assessment aforesaid.

"Second. That the said William A. Wright, Comptroller General, be enjoined from proceeding further in charging your orators with the taxes aforesaid and especially from issuing any execution for the collection of the same.

"Third. That your orators may have all other and further relief that their case may require and equity can afford."

It is urged that the assessment made by the Comptroller General is on the property assessed as a whole, that the bill attacks the assessment as a whole and that the defendant can not by his answer segregate the property and say that if certain parts of it be not subject to taxation that certain other parts certainly are.

I am unable to agree with this contention. The view that I entertain of the matter is that if the Court is asked to enjoin
63 the collection of taxes assessed against certain property, and a portion of the tax assessed is a valid and legal tax and part not, the Court certainly would not enjoin as to the part which is rightfully assessed and sought to be collected, even if it granted an injunction as against a part of it. And if the collecting officer is proceeding against property which can be separated and certain of the parts so separated are taxable and certain parts are not, the Court might, by its decree, distinguish between the parts so subject and the parts not subject and enjoin the collection in accordance therewith.

Where the bill seeks therefore to enjoin the collection of the tax as a whole or any part of it, and the answer sets up, as in this case, that certain items of property are clearly taxable even if the whole is not, it is fairly responsive to the bill. This exception must be overruled.

The last exception is to the following portion of the bill:

"And respondent avers that the leasehold estate, itself, of complainants, for a term of seventy years is more valuable than any life estate could be and worth, in said leased property as improved, a sum of four million dollars, and that the same is in all events taxable to the complainants."

This appears to raise a question which should be heard on its merits and it is not subject to exception.

All of the exceptions to the answer are overruled and the case may be set for hearing on the bill and answer, or, if replication be filed it may be referred to the standing master to take testimony and report on the issues involved.

This 2nd day of June, 1911.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office, June 5th, 1911. O. C. Fuller, Clerk. By R. Q. Fuller, Dep. Clerk.

64 *Decree Overruling Exceptions to Defendant's Answer.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. 1323. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WILLIAM A. WRIGHT.

After argument had upon the exceptions to the defendant's answer as amended on July 5, 1911, and upon consideration thereof, it is ordered, adjudged and decreed that the exceptions each and all be and the same are hereby overruled.

Ordered further that complainants have leave to file replication.

This August 2, 1911.

WM. T. NEWMAN,
United States Judge.

U. S. Circuit Court. Filed in clerk's office, August 3rd, 1911. O. C. Fuller, Clerk.

Agreed Statement of Facts.

Circuit Court of the United States for the Northern District of Georgia.

16794. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WILLIAM A. WRIGHT.

Statement of Facts in the Above-stated Cause.

Part I.

Bonds $2,500,000.00 Mentioned in Sub-paragraph (*a*) of Sub-Division 11 of Paragraph 23 of Defendant's Answer.

65 These bonds grew out of investments by the Georgia Railroad and Banking Company in and obligations assumed for certain western railroad connections, the Macon and Augusta Railroad Company and The Port Royal Railroad Company.

The investments in or the obligations assumed for, The Port Royal Railroad Company, finally charged off to profit and loss at $649,837.84 were a total loss.

The investments in or obligations assumed for the western connections and which as to that shape finally disappear from the books of the Georgia Railroad and Banking Company in a charge to profit and loss of $788,940.12 now exist in 15,000 shares of the capital stock of the Western Railway of Alabama.

The investments in or obligations assumed for The Macon and Augusta Railroad Company which finally, as to that shape, disappear from the books of the Georgia Railroad and Banking Company by a charge to profit and loss of $994,307.06, exist at present in the ownership by the last named company of the Macon and Augusta Railroad from Warrenton to Macon.

For all these dealings with the railroads named The Georgia Railroad and Banking Company claims it had express legislative authority, to-wit:

Act of February 4, 1873, authorizing The Georgia Railroad and Banking Company to indorse the bonds of the Port Royal Railroad Company to the amount of $500,000.00.

Act of February 27, 1875, authorizing The Georgia Railroad & Banking Company to issue bonds for the purchase of the Western Railroad of Alabama to an amount not exceeding $2,595,000.00.

Act of February 26, 1877, authorizing The Georgia R. R. & Banking Company to purchase the Macon and Augusta Railroad.

Act of February 26, 1877, authorizing The Georgia R. R. & Banking Company to issue bonds not exceeding $1,000,000.00 to meet outstanding bonds and indorsed and guaranteed bonds and indebtedness of said company.

In the period from 1873 to 1883—both years inclusive—there was charged off to profit and loss on account of The Georgia R. R. & Banking Company's obligations (taken up by it) for the Macon and Augusta Railroad Company, $994,307.06.

In the period from 1872 to 1882—both years inclusive—there was charged off to profit and loss on account of The Georgia Railroad & Banking Company's obligations (taken up by it)
66 for the Montgomery and West Point Railroad Company and Western Railroad of Alabama, $788,940.12.

In 1879 there was charged off to profit and loss on account of obligations of The Georgia Railroad & Banking Company (taken up by it) for the Port Royal Railroad Company $649,837.84.

The aggregate amount paid out by The Georgia Railroad & Banking Company on account of its obligations for these three railroads, is thus seen to be $2,433,085.02—thus accounting substantially for the $2,500,000.00 of bonds referred to in the answer of defendant.

Part II.

Money Spent on the Property.

April 1, 1853, the railroad property of The Georgia Railroad and Banking Company had cost..... $4,097,048.40

At that date this property consisted of the Main Stem from Augusta to Atlanta, 171 miles, the Athens Branch, 40 miles, and the Warrenton Branch, 4 miles, total, 215 miles.

By 1854 The Georgia Railroad & Banking Co. had acquired the Washington Branch, 18 miles for 156,000.00

So that the total cost of the properties was put April 1, 1854, at..... $4,253,048.40

In 1878 The Georgia Railroad & Banking Co. acquired the Macon and Augusta R. R., 74 miles, at a cost of..... 1,230,000.00

Between April 1, 1854, and April 1, 1881, (the commencement of the lease) there was expended on the property, 307 miles of railroad, the sum of... 4,236,164.81

And during that period real estate was purchased costing 88,651.72

So that up to the date of the lease the property of The Ga. R. R. & Banking Co. had cost..... 9,807,564.93

As to the $4,236,164.81 spent by the lessor on the property prior to the lease, presumably $200,000.00 was raised by bonds issued under authority of
67 a resolution of June 13, 1854, of the Board of Directors, for the purpose of relaying the road west of Madison, $200,000.00 under resolution of January 8, 1868, to build depot at Atlanta and round-house at Augusta, to relay the track and purchase freight cars, and $300,000.00 under Resolution of December 14, 1880, to purchase steel rails.

These disbursements were:

Roadway and Structures..... $2,548,532.31

The particular items under this head were:

Bridges, culverts and trestles..	$182,719.01
Reducing grades	8,520.75
Rails and fastenings.....	1,612,323.77
Side Tracks	67,632.00
Depots and platforms.....	230,317.26
Fuel and water stations.....	19,497.77
Ballasting	2,435.59
Shops and round-houses.....	110,462.92
Section houses	12,329.31
Turntables	3,939.88
Fencing, signs and guards.....	35,462.68
Cross ties	153,392.69

Grain elevator	27,996.76	
Loss and damage settlements	10,552.96	
Federal taxes	70,948.96	
Total roadway and structures		$2,548,532.31

Rolling Stock Equipment:

The particular items under this were:

Locomotives	$839,546.40	
Passenger cars	156,105.65	
Combination cars	15,170.00	
Baggage, mail and express cars	33,239.80	
Freight cars	569,389.46	
Cab cars	8,500.00	
Pay cars	3,700.00	
Road service cars	11,783.60	
68 Air brakes	4,410.00	
Shop machinery and tools	45,487.59	
Total rolling stock equipment		$1,687,332.50

Since the lease the lessees have expended for additions, betterments and improvements on the leased property, the following, including the rolling stock to be used therewith, etc. $6,311,363.08

Of this sum, $4,633,512.77 was paid out of the net income of the leased property, under the heads of "Roadway and Structures" and "Rolling Stock Equipment."

These particular items are:

Road Way and Structures:

Bridges, culverts and trestles	$233,869.86	
Reducing grades	4,886.00	
Rails and fastenings	1,019,936.57	
Side tracks	437,020.28	
Depots and platforms	155,592.59	
Fuel and water stations	87,007.77	
Ballasting	140,737.43	
Shops and round-houses	55,925.77	
Section houses	44,527.40	
Turntables	2,420.78	
Fencing, signs and guards	8,647.26	
Cross ties	61,863.33	
General office at Augusta	37,276.06	
Damage by freshets	38,224.08	
Telegraph & telephone lines	34,076.71	
Changing gauge of track	16,796.27	
Total roadway and structures		$2,378,807.16

Rolling Stock Equipment:

	Locomotives	$649,037.59
	Passenger cars	253,584.26
	Combination cars	24,654.47
	Baggage, mail and express cars	55,851.74
69	Freight cars	1,169,347.05
	Cab cars	17,528.75
	Pay and officers' cars	7,500.00
	Road service cars	17,776.83
	Air brakes	32,981.10
	Shop machinery and tools	61,137.49
	Changing gauge and equipment	65,306.33
	Total rolling stock equipment	$2,254,705.61

In addition to the sum of $4,633,512.77 paid out of the net income of the leased property, the lessees have spent on and in connection with the property the sum of ..... $1,677,850.31 as follows:

1.	Augusta Terminals, Harrisonville Yard	45,942.54
2.	Extension of Athens Branch from its former terminus east of the Oconee River into the City of Athens	131,737.59
3.	Perfecting titles to the right of way and other real estate	46,663.11
4.	Additions and improvements to the Atlanta Terminals on realty of the lessor, the Ga. R. R. & Banking Co., owned at date of lease	979,834.75
5.	Expenditures for realty and improvements used in connection with the lessor's property as the Atlanta Terminals	$ 473,672.32

The money for these last mentioned five items was furnished by the lessees from sources other than the income of the leased property.

The title to the soil involved in the third and fourth of these items is and has been, from a date prior to the lease, in the Georgia Railroad and Banking Company. The land in the first item, viz., Harrisonville Yard and the land in the second item for the extension into Athens have been acquired since the lease under deeds conveying the same to the lessor—the purchase money being advanced by the lessee.

The title to the last (fifth) item is in the lessees.

The whole of the Atlanta Terminals, except old Georgia Freight Depot, used by Georgia Railroad alone, are used jointly by
70 the lessees ("Georgia Railroad") Louisville and Nashville Railroad Company and Atlanta and West Point Railroad Company, each paying its proportion of rent and expense of operation upon the basis of cars and tonnage handled, under the provi-

sions of the contract between the lessees, the Louisville and Nashville Railroad Company and the Atlanta and West Point Railroad Company, hereto attached.

All the expenditures, except the one last mentioned, have been made within the territorial and topographical limits prescribed by the charter of The Georgia Railroad and Banking Company, and have been made for the conservation and improvement of the railroads constructed under that charter, except as stated in the following note:

(Note.) The items "Roadway and Structures" and "Rolling Stock Equipment" apply to the Macon and Augusta Railroad and Washington Branch, as well as to the Main Line, the Athens Branch and the Warrenton Branch—the chartered property. It is not deemed necessary at this time to distribute these items to the different roads and branches.

But so much of them as is chargeable to the Macon and Augusta Railroad and the Washington Branch, which claim no tax exemption, should be deducted from what the other property may, by the event of this suit, be called on to pay. The distribution can then be made if necessary. Meanwhile this statement will suffice as a basis for the determination of the question of taxability or non-taxability of said property or any part thereof as against the complainants herein.

The foregoing statement of the amount spend on the property is not to be considered as the measure of its present value.

Part III.

Rolling Stock.

At the date of the lease from The Georgia Railroad and Banking Company to William M. Wadley and his assigns, May 7, 1881, the lessor owned and leased to the lessee the following rolling stock:

71 40 Locomotive engines, valued at $332,581.67.
4 Sleeping cars.
14 First-class passenger cars.
17 Second-class passenger and baggage cars.
6 Baggage cars.
2 Express cars.
1 Passenger and baggage car.
3 Mail cars.
26 Caboose cars.
800 (about) box cars.

These cars were not valued at the time of the lease and it would be impracticable to put an exact valuation on them now, and it does not seem necessary to do so for the purpose of this litigation at least at this stage of it. They are included in the inventory concluded June 30, 1881, made in connection with the lease; and an

approximation of their value at that date can be made—if it becomes important to do so, by a consideration of the inventory in the custody of the lessor. In the meanwhile it is stated that they were greatly inferior in number and value to the rolling stock now in operation on and appurtenant to the leased railroad.

Since the date of the lease and up to Sept. 1, 1911, there has been an increase in the locomotive engines appurtenant to the railroads of the lessor, so that the present number of locomotive engines is eighty-three (83) valued at $693,928.35, and the present number of cars of all kinds is 1983, to-wit:

Passenger cars	40
Combination cars	9
Pay cars	1
Officers cars	1
Baggage and mail cars	10
Baggage and express cars	11
Freight cars	1836
Cab cars	36
Shanty cars	32
Derrick cars	1
Wrecking cars	6
Total No.	1983

72 While the additions made to the leased property have been paid for by the lessees, the title to the same is claimed by the complainants to be in the lessor under the terms of the lease, defendant contending to the contrary. These additions have been made by complainants and their predecessors in the lease in good faith in the belief that they were necessary and proper for the business of the leased roads which has steadily increased, as shown by Supplement F to Agreed Statement of Facts.

A part of this rolling stock—how much easily ascertainable is apportioned to the Macon and Augusta Railroad and the Washington Branch Railroad, and taxes paid thereon.

Description of Locomotives.

June 30, 1910.

Style.	Cylinders.	Number.	Condition.
8 Wheel Passenger	16 in. x 24 in.	1	Good
8 Wheel Passenger	18 in. x 24 in.	6	Good
8 Wheel Passenger	18 in. x 24 in.	2	Fair
8 Wheel Passenger	19 in. x 24 in.	1	Good
Mogul Freight	17 in. x 24 in.	8	Fair
Mogul Freight	17 in. x 24 in.	1	Good
Mogul Freight	17 in. x 24 in.	1	In shop
Mogul Freight	19 in. x 26 in.	6	Fair
Mogul Freight	19 in. x 27 in.	5	Good
Mogul Freight	20 in. x 27 in.	3	Good

Mogul Freight	20 in. x 26 in.	2	Fair
Mogul Freight	20 in. x 26 in.	1	In shop
10 Wheel Freight	20 in. x 26 in.	12	Good
10 Wheel Freight	20 in. x 26 in.	7	Fair
10 Wheel Freight	20 in. x 26 in.	4	In shop
6 Wheel Switcher	17 in. x 24 in.	1	Good
6 Wheel Switcher	10 in. x 24 in.	2	Good
6 Wheel Switcher	20 in. x 24 in.	2	Good
6 Wheel Switcher	20 in. x 24 in.	2	Fair
6 Wheel Switcher	20 in. x 24 in.	1	In shop
Total		68	

73 Rolling Stock Equipment.

June 30, 1910.

Description of Cars.

Character.	Number.	Condition.
Passenger coaches	37	Good
Passenger coaches	1	Fair
Passenger coaches	2	In shop
Combination coaches	8	Good
Combination coaches	1	In shop
Pay car	1	Good
Officer's car	1	Good
Baggage and mail car	9	Good
Baggage and mail	1	In shop
Baggage and express	11	Good
Freight cars, 40,000 lbs. capacity	30	Bad
Freight cars, 50,000 lbs. capacity	4	Bad
Freight cars, 60,000 lbs. capacity	33	Bad
Freight cars, 60,000 lbs. capacity	506	Fair
Freight cars, 60,000 lbs. capacity	726	Good
Freight cars, 65,000 lbs. capacity	372	Good
Freight cars, 80,000 lbs. capacity	115	Good
Freight cars, 100,000 lbs. capacity	50	Good
Cab cars	36	Good
Shanty cars	32	Bad
Derrick cars	1	Good
Wrecking cars	6	Good
Total	1983	

Part IV.

Taxes Paid by Lessor.

The lessor since the lease, during thirty years, as before the lease, has annually returned the net earnings of the chartered property —not the rental—for taxation, and has paid to the state one-half of one per cent. on the net earnings and not on the rental. Some years the net earnings have been more than the rental, and some years less.

The Georgia Railroad and Banking Company has paid the
74 taxes to the defendant on the assessments to date of the Macon and Augusta Railroad and the Washington Branch, but the payment of the taxes for the year 1910 was under a stipulation, to the effect that the receipt of the taxes by the respondent from The Georgia R. R. & Banking Co. was not to estop respondent from claiming that these taxes were legally due from the complainants.

Supplement "A" to Agreed Statement of Facts.

There are now outstanding four (4) separate issues of bonds aggregating $2,500,000.00.

The following is as accurate a history of the bonds as can be obtained from the records of The Georgia Railroad and Banking Company:

1. Three hundred thousand dollars ($300,000.00) six per cent. bonds, dated July, 1882, and maturing January 1, 1922, were issued under a resolution of the board of directors of April 11, 1882, providing for an issue of $300,000.00 6% bonds, due in forty years, and authorizing the finance committee to sell the same on the best terms possible—"the money arising from said sale to be used for no other purpose than to pay off and buy up the same amount of the bonds of this company and of The Macon and August- Railroad Company, bearing 7% interest."

2. There are two hundred thousand dollars ($200,000.00) of bonds dated July 1, 1866, and maturing January 1, 1922. These bonds were issued under a resolution of the board of directors of The Georgia Railroad and Banking Company of February 9, 1866, as follows: "On motion of Mr. Davison, the president was authorized to issue $200,000. of 6% bonds to mature in 1922, and sell them to the best advantage, using the proceeds for retiring the $275,000.00 of first mortgage Macon and Augusta maturing January 1, 1887."

At the next meeting of the board, May 12, 1886, the president reported that he had made the bonds at 5% instead of 6% and had sold the whole issue.

3. There are one million dollars of bonds of The Georgia
75 Railroad and Banking Company, dated July 1, 1897, and maturing January 1, 1922.

These bonds were issued under a resolution of the board of directors of January 19, 1897, in renewal of an issue for the same amount to mature the first day of July thereafter.

The original issue thus renewed, was made under a resolution of the board of directors of December 13, 1876, for the purpose of "taking up any of the obligations of The Georgia Railroad and Banking Company."

The marginal index of this resolution in the book of minutes is "M. & A."—meaning Macon and Augusta—in the same handwriting as the record of the resolution; and the relations of the two companies were under consideration of this meeting.

As a matter of fact The Georgia Railroad and Banking Company had paid moneys for, and assumed obligations of, The Macon and Augusta R. R. Company, and had legislative authority to buy its property.

4. There are $1,000,000.00 outstanding bonds of The Georgia Railroad and Banking Company, dated January 1, 1910, and maturing January 1, 1940, bearing 4% interest.

These bonds were issued in renewal of a like amount of bonds, which matured January 1, 1910—which maturing bonds were issued under the following circumstances:

At a meeting of the board of directors of The Georgia Railroad and Banking Company, October 14, 1879, a director proposed the issue of $1,000,000.00 6% bonds to run thirty (30) years, to be sold and used half of them immediately "to ease the bank of the trouble of borrowing"—the bonds to be dated July, 1880. No action was taken at that meeting. At the next meeting, December 9, 1879, action was taken, limiting the immediate issue to $500,000.00—"the proceeds to be applied to the redemption of existing obligations of the company only." Bonds seem to have issued as needed up to $1,000,000.00. They appear for the first time in the president's report to the stockholders for the year ending March 31, 1881, under the head of "Maturity of Bonds."

During all the period covering the dates of the issues of these bonds The Georgia Railroad and Banking Company, with legislative authority for so doing, had incurred obligations in ref-
76 erence to The Western Railroad of Alabama, The Macon and Augusta Railroad and The Port Royal Railroad.

When its accounts with these concerns were closed, there was charged off the aggregate sum of $2,443,085.02.

Supplement "B" to Agreed Statement of Facts.

The only rolling stock owned by The Georgia Railroad and Banking Company and turned over to the lessee, now in use by the lessees, consists of:

One locomotive.
Two combination passenger and baggage cars.
Four box cars.
Six shanty cars.

Supplement "C" to Agreed Statement of Facts.

List of occupants of new concrete freight warehouse at Atlanta, etc.:

Name of occupant.	Space occupied.	Use made of such space.	Amt. of monthly rental.
Continental Paper Bag Co.	Section No. 1 18,616 sq. ft.	Mercantile business	$186.16
Browder-Manget Co.	Section No. 2, 19,258 sq. ft.	"	120.00
E. L. Adams Company	Section No. 3,	"	195.00
"	Section No. 4, 16,941 sq. ft.	"	170.00
Fain and Stamps	Section No. 5, 31,461 sq. ft.	"	315.00
Walker Brothers	Section No. 6, 21,616 sq. ft.	"	216.67
A. & W. P. R. R. Co.	Section No. 7, 4,658 sq. ft.	stationery, etc.	46.58

These occupants are handlers of heavy freight, which if they did not occupy this space would remain longer in the cars or in the railroad depot.

77 *Supplement "D" to Agreed Statement of Facts.*

Just before the making of the lease (May 7, 1881) The Georgia Railroad and Banking Company had contracted for a quantity of steel rails. Under a provision of the lease, as follows, this steel was turned over to the lessee:

"The party of the first part also agrees to deliver to the party of the second part and his assigns, all steel rails *with* have been contracted for by the party of the first part, at the expense of the party of the first part."

These rails were purchased for the purpose of being immediately laid on the railroad. This would have been done by The Georgia Railroad and Banking Company but for the lease. They were so nearly actually a part of the railroad that they were treated as such and embraced in the lease.

Supplement "E" to Agreed Statement of Facts.

Stocks and bonds passing under the lease as changed in the meanwhile by substitution:

a. Under the lease there passed an undivided half interest in the Western Railway of Alabama. That interest now exists in the form of fifteen thousand (15,000) shares—one-half—of the capital stock of that railway.

b. Under the lease there passed a certain number, to-wit, 4409 of

the shares of the capital stock of the Atlanta and West Point Railroad and in July, 1881, an equal amount of the certificates of indebtedness of that corporation was issued and was treated as between lessor and lessee as covered by lease.

During the intervening period some of these certificates were exchanged for shares of stock; and on July 1, 1910, all certificates were called in by the corporation and shares of stock issued in their stead, dollar for dollar—so that the 4409 of shares of the capital stock and $440,900 certificates of indebtedness passing under the lease now exists in 8818 shares of capital stock.

78 *c.* Under the lease there passed 1489-3/8 shares of the capital stock of the Rome Railroad. This stock now exists in the form of stocks and bonds of the Union Point and White Plains Railroad Company.

d. Under the lease there passed $40,000 par value, of the bonds of the old Monroe Railroad. These now exist in the form of $40,000 bonds of the reorganized Monroe Railway.

Supplement "F" to Agreed Statement of Facts.

Strike out the following language on page five of said typewritten statement, to-wit, "and have been rendered proper and necessary by the increasing business of these railroads and increasing obligation of the corporation to the public, and such as would have been made by the lessor, if it had continued to operate the property"; and substituting for said language the following: "and have been made by complainants and their predecessors in the lease in good faith, in the belief that they were necessary and proper for the business of the leased roads, which has steadily increased, as follows:

Years.				Tons of freight carried.	Ton mileage.
Fiscal year ended		Mch. 31,	1882	344,579	45,705,074
"	"	"	1883	355,637	46,509,431
"	"	"	1884	397,733	53,230,838
"	"	"	1885	417,705	56,132,771
"	"	"	1886	417,718	56,541,155
"	"	"	1887	447,729	61,959,262
"	"	"	1888	481,312	64,899,408
"	"	June 30,	1889	556,741	75,135,387
"	"	"	1890	600,043	81,601,022
"	"	"	1891	669,784	90,370,108
"	"	"	1892	713,492	81,091,234
"	"	"	1893	720,049	77,406,737
"	"	"	1894	709,741	77,492,258
"	"	"	1895	707,048	82,755,684
"	"	"	1896	793,136	89,025,409
"	"	"	1897	873,333	101,018,509

79

"	"	" 1898	950,928	114,497,487
"	"	" 1899	887,673	110,323,385
"	"	" 1900	908,027	107,908,815
"	"	" 1901	1,055,965	119,578,841
"	"	" 1902	1,106,013	132,529,972
"	"	" 1903	1,414,983	174,472,061
"	"	" 1904	1,419,923	171,010,963
"	"	" 1905	1,458,396	171,269,437
"	"	" 1906	1,710,101	197,051,645
"	"	" 1907	1,927,023	223,435,040
"	"	" 1908	1,718,015	197,745,688
"	"	" 1909	1,561,053	179,942,523
"	"	" 1910	1,711,011	193,974,201
"	"	" 1911	1,843,222	207,943,337

Years.			Number of passengers carried.	Passenger mileage.
Fiscal year ended Mch. 31,		1882	297,022	12,591,303
"	"	" 1883	297,534	12,804,338
"	"	" 1884	341,581	13,989,490
"	"	" 1885	336,723	13,439,680
"	"	" 1886	336,558	13,357,177
"	"	" 1887	345,791	13,536,540
"	"	" 1888	394,400	14,894,891
"	"	" 1889	438,895	16,194,620
"	"	" 1890	455,514	17,339,173
"	"	" 1891	531.729	19,774,625
"	"	" 1892	475,518	17,884,710
"	"	" 1893	427,948	16,219,500
"	"	" 1894	382,716	14,466,665
"	"	" 1895	321,897	13,357,240
"	"	" 1896	410,406	17,234,068
"	"	" 1897	320,986	14,817,21–
"	"	" 1898	322,796	14,493,757
"	"	" 1899	437,930	18,137,883
"	"	" 1900	582,212	19,108,019
"	"	" 1901	612,214	19,839,071
"	"	" 1902	556,803	21,033,343
"	"	" 1903	648,707	21,623,607
"	"	" 1904	676,116	23,022,825
"	"	" 1905	710,883	24,296,025

80

Fiscal year ended Mch. 31,		1906	914,950	28,291,884
"	"	" 1907	814,794	29,763,728
"	"	" 1908	991,849	39,015,522
"	"	" 1909	1,154,053	35,629,704
"	"	" 1910	1,250,099	39,859,261
"	"	" 1911	1,278,934	41,168,091
"	"	" 1912		

Other railroads in Georgia also met increase in their business by proportionate and corresponding business instrumentalities, such as improved track and increased rolling stock.

The Georgia Railroad connects the system of railroads of the Louisville and Nashville Railroad Company, lessee, on the west, with the system of railroads of the Atlantic Coast Line Railroad Company, lessees on the east.

Supplement "G" to Agreed Statement of Facts.

Tabulated statement of taxes paid by the Georgia Railroad & Banking Co. for each and every year since the making of the lease in 1881:

Years.				
1881	Net earnings.....	$227,331.47	Tax.....	$1,136.65
1882	"	180,948.66	"	904.80
1883	"	619,712.63	"	3,098.56
1884	"	477,545.32	"	2,387.72
1885	"	466,244.85	"	2,331.22
1886	"	461,316.30	"	2,306.58
1887	"	463,897.45	"	2,319.48
1888	"	556,627.15	"	2,783.14
1889	"	523,340.77	"	2,616.70
1890	"	451,655.47	"	2,258.28
1891	"	665,862.70	"	3,329.31
1892	"	311,440.49	"	1,557.20
1893	"	359,276.26	"	1,796.38
1894	"	424,238.45	"	2,121.19
1895	"	345,024.04	"	1,725.12
1896	"	388,736.40	"	1,943.68
1897	"	420,567.35	"	2,102.83
81				
1898	"	360,534.81	"	1,802.67
1899	"	400,867.27	"	2,004.34
1900	"	526,538.92	"	2,632.69
1901	"	483,637.64	"	2,418.18
1902	"	544,679.35	"	2,723.40
1903	"	662,901.42	"	3,314.50
1904	"	547,646.72	"	2,738.23
1905	"	570,915.05	"	2,854.57
1906	"	740,020.03	"	2,854.57
1907	"	518,070.36	"	2,590.35
1908	"	335,207.22	"	1,676.03
1909	"	506,539.55	"	2,532.70
1910	"	703,003.86	"	3,530.02
1911	Returned for this year: Net earnings.....	874,918.44	"	4,374.59

Supplement "H" to Agreed Statement of Facts.

The money for the purchase and establishment of the Harrisonville Yard and the money for the Athens Extension were advanced by the lessees and have not been repaid; but will be adjusted at the end of the lease and under its terms.

The foregoing statement of fact having been prepared and submitted by the complainants as being sufficient for the determination of the question of the taxability of the property involved as a whole, and of the subdivisions thereof, is agreed to for that purpose.

If under the pleadings and this statement it is finally decreed that some part of said property is subject to taxation, the taxable valuation thereof is to be ascertained by such proceedings as are lawful and proper.

This Jan. 29, 1912.

T. S. FELDER, *Att'y General.*
JNO. C. HART, *Special Counsel.*
JOS. B. & BRYAN CUMMING,
Complainant's Solicitors.

U. S. District Court. Filed in Clerk's office Feb. 26, 1912. O. C. Fuller, Clerk.

82 *Opinion of the Court.*

In the District Court of the United States for the Northern District of Georgia.

No. —. In Equity.

LOUISVILLE & NASHVILLE RAILROAD CO. and ATLANTIC COAST LINE RAILROAD CO.
vs.
WILLIAM A. WRIGHT, Comptroller General.

Bill, Etc.

This case is now before the court for final decree on a bill filed by the Louisville & Nashvile Railroad Company and the Atlantic Coast Line Railroad Company, lessees of the Georgia Railroad & Banking Company, against William A. Wright, comptroller general of the State of Georgia, to enjoin the collection of certain taxes assessed against them by the comptroller general. The case is here on bill, answer and agreed statement of facts, this agreed statement of facts being in writing and signed by counsel for the parties respectively. The facts necessary to an understanding of the case are as follows:

The Georgia Railroad Company was chartered by an act of the General Assembly of the State of Georgia December 21st, 1833.

On December 18th, 1835, the name was changed to the Georgia Railroad & Banking Company, by which name it is still known.

In the original charter of the company, granted in 1833, is this provision (Sec. 15):

"The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

The question as to whether or not this scheme of taxation is binding upon the state and still exists has been before the courts several times. It was before the Supreme Court of Georgia in City of Augusta vs. Georgia Railroad & Banking Company, 26 Ga. 83 651, and in the case of State of Georgia vs. Georgia Railroad & Banking Company, 54 Ga. 423; and Goldsmith, Comptroller, &c., vs. Georgia Railroad & Banking Company, 62 Ga., 485, and before this court in Georgia Railroad & Banking Company vs. Wright, Comptroller General, 132 Fed. 912, and finally, on appeal from this last named decision, before the Supreme Court of the United States, settling the matter definitely and finally as between the State and the Georgia Railroad & Banking Company, in favor of the Georgia Railroad & Banking Company's right to be taxed one-half of one per cent. on the net proceeds of its investment. Wright, Comptroller, vs. Georgia Railroad & Banking Company, 216 U. S. 420.

So clearly is this settled that the learned counsel for the comptroller general in the present case state in their brief: "It is conceded by the comptroller general that at the time the State incorporated The Georgia Railroad and Banking Company the Legislature had the power to make, and did make, a contract with the Georgia Railroad and Banking Company never to tax that company in excess of the rate fixed in the charter, to-wit, one-half of one per cent on its net income, and that as far as that company is concerned that it has an irrevocable contract with the State," citing the case in 216 U. S. just mentioned.

The original charter of the Georgia Railroad & Banking Company of 1833 (Sec. 12) contains this provision:

"That the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon. * * *"

On May 7th, 1881, the Georgia Railroad & Banking Company entered into a contract with William M. Wadley, under the provision of this charter authorizing it to "rent or farm out," etc., in which it was provided that the Georgia Railroad & Banking Company,

"Hath rented and farmed out to said party of the second part and his assigns, and does by these presents rent and farm out to said party of the second part and his assigns for the full term of ninety-

nine years from the first day of April, one thousand eight hundred and eighty-one,

"All its privileges, general and exclusive, of transporting
84 persons, merchandise, produce and every kind of property whatsoever, which is or may become the subject of railroad transportation, over the lines of railroad owned or controlled by the party of the first part, to the full extent that the party of the first part has and enjoys, or is now entitled to have and enjoy, or may hereafter acquire the right to have and enjoy such privileges, and subject to all the obligations and duties, imposed by its charter in this behalf upon the party of the first part.

"And the party of the first part has also rented and farmed out, and does by these presents rent and farm out to the party of the second part for the aforesaid term of ninety-nine years, as the means of full enjoyment of the privileges hereinbefore rented and farmed out, the following property, to-wit:

"The Georgia Railroad from Augusta to Atlanta, and its branches, viz., the branch from Barnett to Washington; the branch from Camak to Warrenton, and the branch from Union Point to Athens, with all the extensions thereof which may be made hereafter to other points:

"Also, the Macon and Augusta Railroad, from Warrenton to Macon:

"Together with the rights of way, road beds, depots, stations, warehouse, elevators, work shops, wells, cisterns, water tanks and other appurtenances of said railroad and branches."

The Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company have, by successive conveyances, become the successors of William M. Wadley and have been operating said railroads thereunder for a number of years.

The main question for determination here is, did the Georgia Railroad & Banking Company, by its contract and agreement, give to Wadley and his assigns a mere usufruct of this property, or did it convey an estate for years. The contention for the comptroller general is that this instrument, properly construed, vested an estate in complainants, making them liable, under the laws of Georgia, for the taxes thereon. The contrary contention is that this contract conveyed a mere usufruct and that even if it be an estate for years as opposed to an usufruct, it would still leave the landlord liable for the entire taxes due on the property.

The first question, therefore, is do the complainants occupy the position of tenants having the mere right of possession and
85 use, or have they an estate for years in the property. Section 3691 of the Code of Georgia of 1910 is as follows:

"When the owner of real estate grants to another simply the right to possess and enjoy the use of such real estate, either for a fixed time or at the will of the grantor, and the tenant accepts the grant, the relation of landlord and tenant exists between them. In such case no estate passes out of the landlord, and the tenant has only a usufruct, which he cannot convey except by the landlord's consent, and which is not subject to levy and sale; and all renting or

leasing of such real estate for a period of time less than five years shall be held to convey only the right to possess and enjoy such real estate, and to pass no estate out of the landlord, and to give only the usufruct, unless the contrary be agreed upon by the parties to the contract, and so stated therein."

Section 3685, under the chapter heading of "Estates for Years," defines an estate for years as follows:

"An estate for years is one which is limited in its duration to a period fixed, or which may be made fixed and certain. If it be in lands, it passes as realty in this State. It may be for any number of years, so that the limitation be within the rule against perpetuities."

The language used in the contract between the Georgia Railroad & Banking Company and Wadley is "Hath rented and farmed out," following the exact language of Section 12 of the charter, "all its privileges, general and exclusive, of transporting persons, merchandise, produce and every kind of property whatsoever, etc.," and "has also rented and farmed out, and does by these presents rent and farm out to the party of the second part for the aforesaid term of ninety-nine years, as the means of full enjoyment of the privileges hereinbefore rented and farmed out, etc." So that the language of the instrument clearly is such as to bring it within the section of the code of Georgia defining the relation of landlord and tenant. I do not see anything whatever in the definition of landlord and tenant to prevent the creation of such a relation in Georgia for any number of years. The length of the tenancy would be immaterial so far as anything is said in this provision of the statute.

If I understand the argument here, it is not denied that if
86 the relation of landlord and tenant exists in this case, the Georgia Railroad & Banking Company, as owner, is liable for the taxes, but the contention is, as stated above, that the effect of the transaction is to create such an estate in the complainants as to render them liable for the taxes. If the Georgia Railroad and Banking Company is still the owner of this property, and is consequently liable for the taxes on the same, it seems clear that it is liable only under the scheme of taxation provided for it by the Legislature in its original charter. If an estate has been created in the property a difficult question would arise as to whether or not it was such an estate as would make complainants liable for the entire taxes on the property, or for the lesser liability, that of taxes on the value of its leasehold estate.

In my opinion the relation of landlord and tenant exists, that is, the right of complainants here, the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, to possess and enjoy the property, and that they have no estate therein. This view of the case, to my mind, is supported by a good many things. In the first place, by Section 12 of the original charter of the Georgia Railroad & Banking Company, that company is given the power to rent or farm out the right of transportation. After giving this right in the 12th section, in the 15th section comes the provision with reference to taxation at one-half

of one per cent on the net income. The very way in which these two things are placed in the charter seems to indicate that, even though operated by others, the taxes imposed should be upon the income, whether the income came from the operation of the road by the chartered company or by others to whom it might rent or farm out the privilege of transportation.

In the next place, the character of the contract itself is significant. It rents and farms out, in accordance with the charter, "all its privileges, general and exclusive, of transporting, etc.," and "as the means of full enjoyment of" such privileges, rents and farms out the railroad and all its branches and any extensions of the same, together with the rights of way, roadbeds, depots, stations, warehouses, elevators, work shops, wells, cisterns, water tanks and other appurtenances of said railroad and branches." It rents and farms out the right of transportation, and as a means of rendering that right effective, the railroad property. It conveys the
87 right to possess and use the property as a means of carrying out the right of transportation, and nowhere, so far as I can see, conveys any estate in the property; nothing but its use and occupation for the purpose stated.

I think in addition to this that the trend of the decisions of the Supreme Court of the State indicates that this is the view of that court as to the proper relationship between the Georgia Railroad & Banking Company and the companies engaged in operating the railroad. The company is held liable to the public just as if it were engaged in operating the railroad itself. The only instance of non-liability, so far as I have observed, is in relation to the employees of the lessees, they being employees of the lessees their rights for injuries received while in such employment were, of course, against their employers. But otherwise, as to passengers and those for whom it was engaged in carrying freight, and in other instances, the original company itself has been held liable, and in many cases. The latest case, or certainly one of the latest, on the subject is that of Georgia Railway & Banking Company vs. Haas, 127 Ga. 187, and in the opinion of Judge Lumpkin, (p. 199) it is said:

"Counsel for plaintiff in error contend with ability and ingenuity that under the peculiar terms of the charter of the Georgia Railroad and Banking Company (Acts 1833, p. 262; Acts 1835, p. 189) it is not subject to the general rule of liability for the acts of its lessees above referred to. But the agreed statement of facts shows that it has leased the right to operate the entire railroad. If the original company leased its road and turned over the operation of its franchises to others, it is subject to the rule. When the original charter was granted, railroad building was in its infancy, and turnpikes were great public highways. Certain expressions were used which seem perhaps rather inapt to modern railroad conditions. But in view both of the character and the general law, the Legislature never intended that lessees could take the place of the original company in the operation of its cars and franchises as a

railroad company, and the original company be entirely freed from liability in connection therewith."

None of the cases before the Supreme Court of Georgia have discussed the question involved here, because that question had never been made or suggested, so far as I know, until the action of the comptroller general in trying to tax the property ad valorem
88 and the bringing of this proceeding as a result of that action.

Another reason why I think the view expressed is the correct view of the relation between the Georgia Railroad & Banking Company and these operating companies is that the State had acquiesced for twenty-nine years, that is, from 1881 until 1910, in this view of the matter. The Georgia Railroad & Banking Company had returned and paid taxes, in accordance with the provisions of the charter, on the net income derived from the operation of the railroad during that period without any question being made about the correctness of the same. In Wright vs. Georgia Railroad & Banking Company, 216 U. S. 240, in the opinion of Mr. Justice Lurton, in discussing the question of the meaning of the word "stock" in Section 15 of the company's charter (p. 426), after stating that it means "capital," he says this:

"That this is the way in which it has been read and interpreted by everybody who has had to do with the matter of taxation in an official way since 1845, when the railroad seems to have been finished, affords strong evidence that this construction accords with the intent of the charter."

In Temple Baptist Church vs. Georgia Terminal Co., 128 Ga. 669, Judge Cobb, speaking for the Supreme Court of Georgia, says (p. 680):

"The long continued practice of the executive or the legislative department will be treated as persuasive authority by the courts etc."

Of course it is not contended that the action of the proper officials of the State in this matter would estop the State, but the fact of the long continued acquiescence of the State is stated, in the language of Judge Cobb, as "persuasive authority."

Entertaining the opinion that I do therefore, gathered from the charter, the contract between the parties, the trend of the Georgia decisions and the long acquiescence by the State in the action of the Georgia Railroad & Banking Company in continuing to return its property for taxation in accordance with the charter, on the
89 net income derived from its operation, notwithstanding the fact that it was operated by other parties, that the relation of landlord and tenant, under the statutes of Georgia, exists, and that complainants have a mere usufruct to the property and not an estate of any kind therein, it is almost useless to enter upon a discussion of the numerous authorities cited by counsel, pro and con, in their very able and thorough arguments and in their briefs submitted to the court. It is claimed, however, that there are decisions by the Supreme Court of the State which give force to the contrary view of this matter.

One of the cases so relied upon is Wells vs. Savannah, 87 Ga. 397. In that case the land was sold subject to a perpetual ground rent. Chief Justice Bleckley, delivering the opinion in that case, says:

"Possession of real estate attended with an indefeasible right to occupy in perpetuity, and also with an indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money, will constitute the purchaser the substantial owner of the property. So long as his possession, supplemented by these rights, continues, he is not a mere lessee, but a purchaser admitted into possession on the faith of his contract of purchase."

I do not think that case is at all like this case.

Another case relied upon is that of Central Railroad & Banking Company vs. Macon, 43 Ga. 605. As I understand the question involved in that case it is not an authority either way upon the question now before this court, but it was decided by the majority of the Court, Judge McCay dissenting, that the Macon & Western Railroad Company had the right to lease the road from the Central Railroad & Banking Company notwithstanding there was a provision in the agreement for a sale of the road after legislative authority was obtained. The only thing I understand counsel to emphasize in the case is the use of the word "lease" in connection with that agreement. It may be remarked here that this use of the word lease is not deemed very material if it appears that what was done was to create the relation simply of landlord and tenant and to contract merely for the right to use and not to convey an estate in the property.

Section 3690 of the Code of Georgia, which must be read in connection with the section heretofore cited, is as follows:

"When one grants to another an estate for years out of his
90 own estate, reversion to himself, it is usually termed a lease. It may be confined to a particular interest in lands, such as mining or agricultural, in which event no other interest passes. If no object of the lease is stated, the mining interest will not pass unless the circumstances justify an implication of such an intention in the parties."

The case of South Carolina & Georgia Railroad Co. vs. Augusta Southern Railroad Co., 107 Ga. 164, is also cited as an authority here. In that case the plaintiff company had "granted, demised, leased and farmlet" to the latter company its railroad right of way, depots, yards, rolling stock and all its other property during the corporate existence of the lessee with warranty for its enjoyment. The question- made in the case were whether the contract between the parties created a partnership, and if not whether there was a trust relation between the parties. In discussing the case Chief Justice Simmons in the opinion used the expression that the lessee during the term of the lease was the absolute owner of the property, with the right to use it and operate it as it deemed best (p. 182). In another place he used the language (p. 183), "This was purely a contractual relation between landlord and tenant, which was enforcible at law." The Chief Justice was discussing entirely the question made in that case, which related to whether it was a case for equitable relief, as stated, whether a partnership was created and

whether a trust relation existed and was not discussing at all the question that is involved here, certainly not in any manner attempting to decide whether the lessee there had acquired an estate in the property or whether it was a mere ordinary relation of landlord and tenant under the Georgia law. It cannot in any sense be considered a decision affecting the special matter at issue here.

There is another decision of the Supreme Court of Georgia, and a recent decision, that contains language which seems to me peculiarly applicable here. That is the case of the State of Georgia vs. Western & Atlantic R. Co., 136 Ga. 619. The right of the State to put certain taxes on the Western & Atlantic Railroad Co., a lessee of the road from the State, was the question involved, and referring to the lease contract there, which was for twenty-nine years from December 29th, 1890, Judge Evans in the opinion, says:

"The case presented is not that of a perpetual leaseholder,
91 where the tenant is the virtual owner of the property, entitled to its use forever and subject to pay taxes thereon as owner, as was the case in Wells vs. Savannah, 87 Ga. 397 (13 S. E. 442). In making the lease the State reserved the right of forfeiture on broken conditions subsequent, and imposed terms and conditions indicating that no estate was intended to be conveyed to the lessee, but that the lessee was to have only a usufructuary interest during the lease period."

In the lease between the State and the Nashville, Chattanooga & St. Louis Railway Company, the act authorizing the lease provided that "If the lessee fails to comply with the lease contract, the Governor, at his option, may declare the lease forfeited and take immediate possession." Here the lease contract provides that "the party of the first part reserves the right, in addition to all other remedies now usual or hereafter to become usual in the law, to enter upon and resume possession and enjoyment of all its property for the breach of any of the covenants or agreements of this indenture." While there may be some difference between the "terms and conditions" in the lease of the State to the Western & Atlantic Railroad Co., and that of the Georgia Railroad & Banking Co. It is well understood and well known that in practical effect both roads have been operated since the contracts in very much the same way, the lessee companies, in both instances, keeping up and improving the track, buying new rolling stock and keeping the railroads up with what modern railroading requires.

Counsel for the comptroller general here rely upon the case of Jett vs. University of the South, 208 U. S. 489. In that case the University of the South, known familiarly as Sewanee, had been granted an exemption from taxation as to one thousand acres of land to be used for the purposes of the university. The language of the exempting section of the act is as follows (p. 491):

"Be it further enacted, That said university may hold and possess as much land as may be necessary for the buildings and to such extent as may be sufficient to protect said institution and the students thereof from the intrusion of evil-minded persons who may settle near said institution, said land, however, not to exceed ten thousand

acres, one thousand of which, including buildings and other effects and property of said corporation, shall be exempt from tax-
92 ation as long as said lands belong to said university."

In 1903, it appears that an act was passed by the Legislature of Tennessee taxing leasehold interests in land. It also appears that the one thousand acres of land were duly surveyed and marked out and many buildings erected for the university, and "leases were also granted by it of lots within the thousand-acre limit to persons who, under such leases, built upon the lots severally leased to them. By this method a population of about 1,000 or 1,200 people had been gathered within the village called Sewanee, situated within the limit stated, and which was a barren wilderness when the charter was granted. In fact, the very existence of the village is the result of the efforts of the university." Under the act of the Legislature of 1903, proceedings were taken to subject the leasehold interests to taxation. Out of this grew the decision of the Supreme Court of the United States referred to above. The Supreme Court held that there was a leasehold interest in that case subject to taxation. It was stated in the opinion, however, that it was not necessary to determine what the exact interest of the lessees was.

If it was believed that the complainants here had such a leasehold interest in this property, it would be an interesting question as to how and in what way it could be reached in Georgia for taxation. The comptroller general has assessed the whole property for taxation, both the fee and entire interest otherwise in the property and there is no attempt to separate any leasehold interest from the fee.

In Wright vs. Georgia Railroad & Banking Co., supra, the opinion discusses the extent to which the Georgia Railroad & Banking Company could claim that the scheme of taxation provided for in the charter, that is, for taxes on the net income only, applied, and after stating the fact that the road at present has a value of $4,000,000 in excess of the cost and of the authorized capital, proceeds in this way:

"This plan of tax upon net earnings is quite inconsistent with any other form of taxation, and is absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested. A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and
93 used to make that income, including the enjoyment of its franchises. It is not to be presumed, in the light of the public policy of the time, that the State intended that this pioneer railroad should be subjected to any form of taxation of property, which produced the taxable income.

"We are, therefore, of opinion that this property is not subject to any other method of taxation than that of the special system stipulated for by the contract, and that the act of the Georgia Legislature, in so far as it provides for an ad valorem tax upon any part of this invested capital of the Georgia Railroad & Banking Company, does impair the obligation of the contract."

So it will be perceived that the view of the Supreme Court was that this railroad and its accretions during all the years of its existence

and during the lease, and all the property used by it to make this net income, was not taxable otherwise than provided in its charter, because to tax part of it in any other way would be double taxation.

The discussion of this, however, may be a mere abstraction, because, as stated above, I have reached the conclusion that a mere usufruct exists as to this property.

In the decision of the Supreme Court of the United States cited above, in Wright vs. Georgia Railroad & Banking Company, there are suggestions made which, it seems to me, are important in reaching a conclusion as to whether there is any of the property from which the comptroller general is now seeking to collect an ad valorem tax subject to that tax. It is clear to my mind that the interest of the lessee companies in the Atlanta terminal is subject to taxation in that way. Mr. Justice Lurton in that opinion says that:

"An investment made nearly seventy-five years since of $4,156,000 has now a value of $4,000,000 in excess of that cost. The property is the same property. The conceded fact is that through renewals, alterations and betterments made from time to time and the natural increase in the value of the road, this appreciation has come about. There has been no suggestion that there has been any hiding away of capital added, by either new stock, or by the use of bonds or other forms of credit, nor that the improvements made from time to time, called "renewals, alterations and betterments,"
94 have been other than the necessities of an enlarging business and the improved maintenance naturally demanded."

It is the road thus spoken of by Mr. Justice Lurton, with its "renewals, alterations and betterments," that makes the net income which is subject to taxation. Anything beyond this or outside of this would appear to be subject to ad valorem taxation.

So far as I have been able to gather from the agreed statement of facts and from the agreement between the Louisville & Nashville Railroad Company, called the Louisville Company, the Atlanta & West Point Railroad Company, called the West Point Company, and the lessees of the Georgia Railroad & Banking Company, called the lessees, these terminals, brought into existence under this agreement, are a separate and distinct thing from that which produces the taxable income. There may be some part of this terminal property which amounts to a mere betterment of the old property, and not thus subject, but what that may be I am unable at present, from the facts before me, to determine. Counsel agree, as I understand it, that should this property be found so subject, it would require either a reference or some further action to determine this. Probably in a way these terminals do help the income, but I do not believe that they come within the classification of "renewals, alterations and betterments" of the original property. They seem to me to be separate and apart from that. I think they are subject to ad valorem taxation by the State.

The claim by the comptroller general of the right to collect certain ad valorem taxes of the complainants because of an issue of bonds by the Georgia Railroad & Banking Company I am unable to understand satisfactorily from the pleadings or from the agreed

statement of facts. It makes clear, of course, the fact that bonds were issued and that the bonds, or the proceeds thereof, were used in connection with a certain railroad, but this claim of a right to tax by reason thereof is not clear to me. No opinion, therefore, is expressed upon this feature of the case, and counsel will be further heard before it is determined.

I do not believe that the claim for ad valorem taxes on the improved terminals in Augusta or on the slight extension of the terminus of the road into Athens can be sustained. It seems to
95 me that both of these come within the classification of "renewals, alterations and betterments" to the road as it existed originally.

This 18th day of July, 1912.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office July 18, 1912. O. C. Fuller, Clerk. By F. L. Beers, Deputy.

Final Decree.

In the District Court of the United States for the Northern District of Georgia.

In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WILLIAM A. WRIGHT, Comptroller General.

Decree.

This cause coming on to be heard for final decree, upon consideration of the pleadings therein and the agreed statement of facts, and after hearing argument of counsel, it is considered, adjudged and decreed as follows:

1. That the lease executed by the Georgia Railroad & Banking Company to William M. Wadley, exhibit to the bill of complaint in this cause of which the complainants are assignees under said Wadley, created the relation of landlord and tenant between the parties thereto and did not vest in said lessees any estate, but only an usufruct, which is not subject to be taxed to said lessees, and that the property covered thereby, with its renewals, alterations and betterments made by the lessees is not subject to ad valorem taxation.

2. That the scheme of taxation provided by Section 15 of the charter of the Georgia Railroad & Banking Company embraces the railroads of the said The Georgia Railroad & Banking
96 Company with their renewals, alterations and betterments made by the lessees including the rolling stock and equipment thereof, and that the said property sought to be taxed (except

as hereinafter excepted) is covered by the scheme of taxation of said Section 15 of the charter aforesaid and is not subject to ad valorem taxation.

3. That the property known as Augusta Terminals and Athens extension and terminals is covered by said charter scheme of taxation and is not subject to ad valorem taxation.

4. That the Atlanta Joint Terminals are subject to ad valorem taxation.

5. That except as to said Atlanta Joint Terminals, decreed to be subject to ad valorem taxation, the comptroller general is enjoined from further enforcement of any proceeding to subject the property to ad valorem taxation. As to the assessment and the enforcement of collection against said Atlanta Joint Terminals an injunction is refused and denied.

In open court this 18th day of July, 1912.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office July 18, 1912. O. C. Fuller, Clerk. By F. L. Beers, Deputy Clerk.

Appeal of William A. Wright, Comptroller General.

In the District Court of the United States for the Northern District of Georgia.

No. —. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WM. A. WRIGHT.

The above named defendant, Wm. A. Wright, conceiving himself aggrieved by the decree made and entered on the 18th
97 day of July, 1912, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

THOS. S. FELDER,
Attorney General,
JNO. C. HART,
Special Counsel.
SAML. H. SIBLEY,
Attorneys for Wm. A. Wright.

Dated July 18th, 1912.

Order Allowing Appeal.

The foregoing claim of appeal is allowed.
This July 18th, 1912.

WM. T. NEWMAN,
Judge District Court of the United States for the Northern District of Georgia.

U. S. District Court. Filed in Clerk's office July 19th, 1912. O. C. Fuller, Clerk. By J. D. Steward, Deputy.

Assignment of Errors of William A. Wright, Comptroller General

In the District Court of the United States for the Northern District of Georgia.

No. —. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WM. A. WRIGHT.

Now, upon this the 18th day of July, in the year of our Lord one thousand nine hundred and twelve, comes the said
98 defendant Wm. A. Wright, by his solicitors, and files with his petition for appeal the following assignment of errors and alleges:

First. That the Court erred in adjudging and decreeing that the lease executed by the Georgia Railroad & Banking Company to William A. Wadley, exhibited in the bill, created the relation of landlord and tenant and did not vest in the lessees any estate, but only the usufruct which is not subject to be taxed to said lessees and in not holding that the same created in the lessees an estate and interest such as rendered them liable for taxes on the leased property as a whole, as the owners thereof for the time being.

Second. The Court erred in not holding that the lessees under said lease had a valuable estate and interest in the leased property in respect of which they were taxable, even if not liable for taxes on the entire value of the property.

Third. The Court erred in holding and adjudging that the lessees were not liable for ad valorem taxation on the renewals, additions and betterments made by them, and especially the betterments made with their money for which they pay no added rentals and for which they are to be reimbursed at the end of the lease.

Fourth. That the Court erred in decreeing that the rolling stock and other personal property is protected from ad valorem taxation by the Georgia Railroad & Banking Company's charter, the same having been purchased and paid for by the complainants, and never having belonged to the Georgia Railroad & Banking Company.

Fifth. The Court erred in holding that the additions and betterments made to the leased property by the lessees are protected from ad valorem taxation by the charter of the Georgia Railroad and Banking Company, the same having been made at the expenses of the lessees for their own use and benefit, and they being entitled to payment therefor before surrendering the same to the Georgia Railroad & Banking Company at the expiration of the lease.

99 Sixth. The Court erred in holding that the charter of the Georgia Railroad & Banking Company protected the complainants, lessees, from ad valorem taxes, and in not holding that the same was a contract personal to the Georgia Railroad & Banking Company, of which complainants could take no advantage.

Seventh. The Court erred in adjudging that the property known as the Augusta Terminal and the Athens Extension and Terminals is covered by said charter and not subject to ad valorem taxes, it appearing as to each that they were constructed at the expense of the lessees, for their own use and benefit, that they pay no rent therefor and will be compensated before surrendering the same at the end of the lease.

Eighth. The Court erred in not holding that the leased property in so far as the value thereof was increased by money borrowed on bonds by the Georgia Railroad & Banking Company was subject to ad valorem taxation, and especially as to the investment of six hundred thousand dollars raised on bonds to buy new steel rails, build depots and build round houses, as disclosed in the statement of facts.

Ninth. The Court erred in not holding complainants liable to ad valorem taxation on the bonds and debentures assigned to them by said lease, and the proceeds thereof, and especially on the bonds of the Monroe R. R. Co. and the debentures of the Atlanta & West Point Railroad Company and 15000 shares of the capital stock of the Western Railway of Ala. of the value of $1,348,900.

Tenth. The Court erred in enjoining complainant from further enforcement of any proceeding to subject to ad valorem taxation any of the property mentioned in the answer, except the Atlanta Joint Terminals, and in not holding each item of said property subject to taxation, whether leased from the Georgia Railroad & Banking Company, or the result of investments by the lessees, the charter contract of the Georgia Railroad & Banking Company having no application to any of said property in the hands of the complainants.

100 Wherefore, the defendant prays that the said decree in the particulars aforesaid be reversed.

THOS. S. FELDER, *Attorney General.*
JNO. C. HART, *Special Counsel.*
SAML. H. SIBLEY,
Solicitors for Wm. A. Wright.

U. S. District Court. Filed in clerk's office July 19, 1912. O. C. Fuller, Clerk. By J. D. Steward, Deputy.

Appeal Bond of Wm. A. Wright, Comptroller General.

Know all men by these presents, that we, Wm. A. Wright, as principal, and Philip Cook, as surety, are held and firmly bound unto Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company in the full and just sum of three hundred dollars, to be paid to the said Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, their attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated thi- the 18th day of July, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at the District Court of the United States for the Northern District of Georgia in a suit pending in said court between Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, plaintiffs, and Wm. A. Wright, defendant, a decree was rendered against the said Wm. A. Wright, and the said Wm. A. Wright having obtained an appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to said Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at the City of Atlanta, in said circuit, on the — day of
101 October next.

Now, the condition of the above obligation is such that if the said Wm. A. Wright shall prosecute his appeal — effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. A. WRIGHT. [SEAL.]
PHILIP COOK. [SEAL.]

Sealed and delivered in presence of:

——— ———.
——— ———.

Approved by:
WM. T. NEWMAN,
U. S. Judge.

U. S. District Court. Filed in clerk's office July 19, 1912. O. C. Fuller, Clerk. By J. D. Steward, Deputy.

[Citation of Appeal, numbered pp. 114-115, taken out of printed record.]

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Cross-Appeal of Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company.

In the District Court of the United States for the Northern District of Georgia.

In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY

vs.

WILLIAM A. WRIGHT, Comptroller General.

The above named complainants Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad, considering themselves aggrieved by the order and decree made and entered by the Court in the above stated case on the 18th day of July, 1912, wherein it was ordered, adjudged and decreed that the property known as Atlanta Joint Terminals was subject to ad valorem taxation and an injunction against the assessment of the defendant thereon and of further proceedings thereunder, as prayed in said bill of complaint, was denied, do hereby appeal from the said order and decree of July 18th, 1912, to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons specified in the assignment of errors filed herewith and they pray that this appeal (which is a cross-appeal in said case, the said respondent, William A. Wright, having appealed from the rest of said decree of July 18th, 1912) may be allowed and that the transcript of the record, papers and proceedings upon which said order and decree was made duly authenticated which has been ordered sent to the said United States Circuit Court of Appeals, be ordered to be likewise taken as the transcript of the record, papers and proceedings in this cross-appeal.

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JOS. B. CUMMING,
McDANIEL & BLACK,
TYE, PEEPLES & JORDAN,
R. C. ALSTON,
KING & SPALDING AND UNDERWOOD,
Solicitors for Cross-Appellants and Complainant Above Named.

U. S. District Court. Filed in clerk's office July 19, 1912. O. C. Fuller, Clerk.

Order Allowing Appeal.

The foregoing petition for appeal is granted and the claim of appeal thereunder made is allowed as prayed.

This July 19th, 1912.

WM. T. NEWMAN, *U. S. Judge.*

U. S. District Court. Filed in clerk's office July 19, 1912. O. C. Fuller, Clerk. By J. D. Steward, Deputy.

103 *Assignment of Errors of Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company.*

In the District Court of the United States for the Northern District of Georgia.

In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY
vs.
WILLIAM A. WRIGHT, Comptroller General.

And now come the complainants, Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, and file the following assignment of errors, particularly stating the errors on which they, and each of them, will rely in the prosecution of their cross-appeal from the decree made in the above entitled cause by this Honorable Court on July 18th, 1912.

1. Because the Court erred in not sustaining the first exception filed by the complainants in said case to the portion of the answer of the defendant set out in said exception, contained in the amendment to said answer filed July 5th, 1911, the grounds of error being:

(*a*) Because these cross-appellants insist that said portion of said answer excepted to was not responsive to any matter or thing contained in complainants' bill of complaint.

(*b*) Because the same is insufficient in that it does not designate any part of the lands mentioned in said part of said answers as being other than the property leased from the Georgia Railroad and Banking Company, as alleged in said bill of complaint, so that complainant can neither properly reply thereto or set the same down for argument as to the sufficiency in law.

2. These cross-appellants further assign error upon the action of the Court in refusing to sustain the third exception made by complainant to said amendment to said answer of July 5th, 1911, for the following grounds:

104 (*a*) Because the matter set up in said part of said answer excepted to was wholly impertinent or irrelevant to any matter or thing pleaded in said bill of complaint, and is not responsive thereto.

(*b*) Because the same did not set up matter that was responsive to the bill of complaint, but matter which, if relevant at all, would be only the proper subject matter of a cross-bill.

(*c*) Because said part of said answer was wholly insufficient in averment to be replied to, and was so indefinite that it could not be set down with the bill to be submitted as insufficient as a matter of law.

3. These cross-appellants further assign error and say that the Court erred in not sustaining the fourth exception filed by complain-

ants to the amendment of the answer of the defendant filed July 5th, 1911.

(*a*) Because said portion of said answer was wholly impertinent or irrelevant to any matter pleaded in said bill of complaint and was not responsive thereto.

(*b*) Because it did not designate what lands were claimed to be other than the property leased from the Georgia Railroad and Banking Company.

(*c*) Because the same was wholly insufficient in averment to be replied to, and was so indefinite that it could not be set down with the bill to be submitted on bill and answer as insufficient as matter of law.

4. These cross-appellants assign error further because the Court erred in overruling the fifth exception of these complainants to the amendment of the answer filed July 5th, 1911, and also the sixth exception filed to said amendment of said answer, the errors assigned in each ruling being that the matters set up were wholly impertinent and irrelevant to any matter or thing pleaded in said bill of complaint and were not responsive thereto, were insufficient to be replied to and too indefinite to be set down to be heard with the bill on bill and answer.

5. These cross-appellants further assign error because the Court erred in decreeing that the Atlanta Joint Terminals as assessed by the respondent, as shown in said bill of complaint, were sub-
105 ject to ad valorem taxation, it appearing from the agreed statement of facts, and the exhibit thereto, that a large part of said Atlanta Joint Terminals consisted of property received and held by the said complainants under the lease of the Georgia Railroad and Banking Company to Wm. A. Wadley, and as to the said complainants hold only a usufruct.

(*a*) Because said property in this assignment of error just mentioned, received under said lease, formed an integral and essential part of said Atlanta Joint Terminals, as shown by the pleadings, and agreed statement of facts in said case, that the said assessment of the said comptroller included as an integral and essential part thereof such property, which was not subject to ad valorem taxation and its presence in said assessment vitiated the entire assessment of said Atlanta Joint Terminals.

(*b*) Because under the facts of said case the assessment of said Atlanta Joint Terminals as made by the comptroller general, as against these respondents, under a demand for a return of the properties known as the Georgia Railroad, operated by them, was illegal, without authority of law, and should be enjoined.

6. For a further assignment of error these cross-appellants say that the Court erred in not enjoining said assessment of said Atlanta Joint Terminals for each of the reasons assigned in the last above assignment of error.

7. For a further assignment of error these cross-appellants say the Court erred in holding in this case that said Atlanta Joint Terminals were liable to ad valorem taxation, as against these respondents,

under the assessment of the said comptroller general sought to be enjoined.

(*a*) Because the demand for return made upon these respondents and the assessment made against them, as appears in the record in this case, were solely as lessees of the Georgia Railroad and Banking Company, on the ground that they as such lessees were bound to return its property for taxation and to pay ad valorem taxes upon the whole thereof; that these respondents as such lessees of
106 said Georgia Railroad were not liable to be taxed or to have assessed against them for taxation any of the said property held by them as lessees of the Georgia Railroad under said lease.

(*b*) Because any decree seeking to tax property other than that held by these respondents as such lessees is not germane to the demand for taxes made, and is not properly embraced in the assessment attempted to be made against these respondents jointly as such lessees.

8. These cross-appellants assign further error in said decree appealed from, because they say that it appears from the facts of said case that they, as lessees, have no such interest or estate in any of the property involved in said Atlanta Joint Terminals as renders the same subject to taxation against them, but that under the laws of Georgia governing taxation the same should be assessed for taxation against the respective owners thereof, each and all of whom it appears are taxpayers of the State of Georgia, and against whom taxes can be levied and collected if due.

In order that the foregoing assignments of error may be a part of the record, respondents present the same to the Court and pray a reversal of so much of said decree as holds the property known as Atlanta Joint Terminals taxable ad valorem and as refuses an injunction to restrain the assessment thereof and collection of ad valorem taxes thereon, and that such disposition be made of the cause as the equity of the case may require.

JOS. B. & BRYAN CUMMING,
McDANIEL & BLACK,
TYE, PEEPLES & JORDAN,
R. C. ALSTON,
KING & SPALDING AND UNDERWOOD,
Solicitors for Cross-Appellants.

JOS. B. CUMMING,
ALEX. C. KING,
Solicitors for Complainants, the Cross-Appellants, Louisville & Nashville R. R. Co. and Atlantic Coast Line R. R. Co.

U. S. District Court. Filed in clerk's office July 19, 1912. O. C. Fuller, Clerk.

107 *Appeal Bond of Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company.*

In the District Court of the United States for the Northern District of Georgia.

In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY

vs.

WILLIAM A. WRIGHT, Comptroller General.

Know all men by these presents:

That we, Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, as principals, and Thomas K. Scott, as security, are held and firmly bound unto Wm. A. Wright, defendant in the above stated case, in the sum of five hundred ($500.00) dollars, for the payment of which to the said Wm. A. Wright well and truly to be made we bind ourselves, our successors, heirs and administrators, firmly by these presents. Signed, sealed and dated this July 19th, 1912.

The condition of the above obligation, however, is that, whereas the above named complainants, Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, have entered a cross-appeal to the United States Circuit Court of Appeals for the Fifth Circuit from a decree rendered on July 18th, 1912, in the above stated case, adjudging in favor of the above named Wm. A. Wright that certain property in said proceedings described, known as Atlanta Joint Terminals, is liable to ad valorem taxation, and denying the injunction on the enforcement of the assessment thereon as prayed, said cross-appellants seeking to reverse said final decree.

Now, therefore, if the said cross-appellants shall prosecute their cross-appeal to effect and answer all costs and damages that may be awarded against them, or either of them, if they, or either
108 of them, fail to make good their cross-appeal, then this obligation to be void, else of full force and effect.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY,

By Their Attorney at Law,

ALEX. C. KING, *Principal.* [SEAL.]

THOS. K. SCOTT, *Security.* [SEAL.]

Attest:

HUGHES SPALDING,

Notary Public, Fulton County, Georgia.

This bond approved as to form, amount and sufficiency of security.

This July 19th, 1912.

WM. T. NEWMAN,
U. S. Judge.

U. S. District Court. Filed in clerk's office July 19, 1912. O. C. Fuller, Clerk.

[Citation of Appeal, numbered pp. 124-125, taken out of record.]

* * * * * * *

Stipulation of Counsel as to Transcript.

In the District Court of the United States for the Northern District of Georgia.

In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and THE ATLANTIC COAST LINE RAILROAD CO.

vs.

WILLIAM A. WRIGHT, Comptroller General.

The parties to the above stated case having respectively taken an appeal and cross-appeal do hereby elect and agree that
109 the appellant shall file in the Appellant Court to be printed under the supervision of its clerks under its rules, a transcript of the record in the above stated cause, and they do hereby stipulate and agree that it is necessary for the proper consideration of the assignment of errors that the entire record in said cause, to-wit, the original bill of complaint in said cause and exhibits, the answer of the defendant thereto with all amendments thereto, the exceptions filed by complainants to the said answer and amendments, the agreed statement of facts in said cause, with the exhibits thereto, the opinion of the Court on the exceptions and on the final hearing, the decree overruling the exceptions as last filed, and the final decree in the case dated July 18th, 1912, the petitions for appeal and cross-appeal, citations, bonds and assignments of error on both appeal and cross-appeal.

July 19th, 1912.

THOS. S. FELDER,
Att'y Gen'l;
JNO. C. HART,
Solicitor- for Wm. A. Wright, Appellant.
JOS. B. CUMMING,
ALEX. C. KING,
Solicitors for the Above Stated Complainants, Cross-Appellants.

U. S. District Court. Filed in clerk's office July 19, 1912. O. C. Fuller, Clerk, by J. D. Steward, Deputy.

110 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Northern Division, Northern District of Georgia:

I, Olin C. Fuller, clerk of the District Court of the United States for the Northern District of Georgia, do hereby certify that the above and foregoing 126 pages of printing and writing contain a true copy of the original record, assignment of errors and all proceedings had (as stipulated by counsel) in the case of Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company vs. William A. Wright, comptroller general, as fully as the same remain on file and of record in my office, except the original citations with entry of service thereon, are included in the stead of copies.

In testimony whereof I hereunto set my hand and the seal of said District Court at the City of Atlanta, Georgia, this the 9th day of August, A. D. 1912.

[SEAL.]

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

111 *Supplemental Transcript.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 2417.

WILLIAM A. WRIGHT, Appellant and Cross-Appellee,
versus
LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Appellees and Cross-Appellants.

Stipulation as to Record and Exhibit to Agreed Statement of Facts.

Original record filed Sept. 20, 1912.

U. S. Circuit Court of Appeals. Filed Sep. 25, 1912. Frank H. Mortimer, Clerk.

112 United States Circuit Court of Appeals, Fifth Circuit.

No. 2417.

WILLIAM A. WRIGHT, Comptroller General, Appellant,
versus
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, Appellees,

and

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, Cross-Appellants,
versus
WILLIAM A. WRIGHT, Comptroller General, Cross-Appellee.

Appeal and Cross-appeal from the District Court of the United States in the Northern District of Georgia.

113 It is hereby agreed and stipulated between undersigned counsel of record for the several parties to the above stated case as follows:

1. In printing the record in said case on page 79 of the printed record the words "Tons of Freight Carried" should be "Passengers Carried," and the words "Ton Mileage" should be "Passenger Mileage," where such terms occur therein.

Also on page 80, under head "Supplement G," the words "Tons of Freight Carried" and "Ton Mileage" are erroneously included, and should be stricken, and it is agreed that the printed record shall be corrected by proper interlineation or stamped so as to make it conform to these stipulations in these respects.

2. That the Joint Terminal Agreement between the complainants in the above stated case, the Atlanta and West Point Railroad Company and the Louisville and Nashville, Railroad Company, dated April 1st, 1907, referred to in the amended answer of the defendant, Wright, Comptroller General, was duly filed as an exhibit to and a part of the agreed statement of facts, copy of which said agreement thus filed is attached hereto and it is agreed that the same be now printed by the clerk of the Circuit Court of Appeals and filed as part of the record in this case, and be so treated.

THOMAS S. FELDER, *Att'y Gen.;*
JNO. C. HART,
SAMUEL H. SIBLEY,
For Wm. A. Wright, Appellant and Cross-Appellee.
JOS. B. CUMMING,
ALEX. C. KING,
Solicitors for Appellees and Cross-Appellants.

September 16th, 1912.

114 EXHIBIT TO AGREED STATEMENT OF FACTS.

Agreement Between the Louisville & Nashville R. R. Co. and Atlantic Coast Line R. R. Co. Lessees of the Georgia R. R., the Atlanta & West Point R. R. Co., and the Louisville & Nashville R. R. Co.

April 1, 1907.

Covering Joint Use and Operation of Terminal Facilities, Atlanta, Ga.

This agreement, made this first day of April, 1907, between the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, Lessees of the Georgia Railroad, hereinafter designated as Lessees, first parties; the Atlanta & West Point Railroad Company, for itself and as Lessee of the Atlanta Belt Railroad, hereinafter designated as the West Point Company, second party; and the Louisville & Nashville Railroad Company, hereinafter designated as the Louisville Company, third party,—shall be of effect from the first day of July, 1904, and continue during the entire remaining term of the lease made by the Georgia Railroad & Banking Company to William M. Wadley and assigns, bearing date the 7th day of May, 1881, which said lease has been duly assigned to the first parties hereto.

Whenever the words "First Parties," "Second Party" or "Third Party," or any other designation of said parties, are used herein, the successors and assigns of each of said parties shall be held and bound by the terms hereof.

Whereas, The Louisville Company is the owner of a railroad extending from Knoxville, Tennessee (where it connects with its line extending northwardly to Cincinnati, Ohio), to Marietta, Georgia; and has constrd-ed a branch of said road connecting with the Western & Atlantic Railroad—Nashville, Chattanooga & St. Louis Railway, Lessee—at Cartersville, Georgia; and has secured from the Nashville, Chattanooga & St. Louis Railway certain trackage rights over the Western & Atlantic Railroad between Marietta and Cartersville and Central Avenue, Atlanta, where connection is made with the tracks of the Georgia Railroad, but which said trackage rights carry no terminal rights or facilities therewith, and

115 Whereas, The Lessees have terminal property in Atlanta between Central Avenue and the eastern city limits upon which existing tracks are being rearranged and added to so as to yield larger and more convenient terminal facilities, and

Whereas, The West Point Company is the Lessee from the Atlanta Belt Line Company of the freight warehouse adjoining the freight warehouse of the Georgia Railroad near Central Avenue and the terminal yard near Hulsey Station, and tracks and terminals between its "Y" tracks connecting with the Georgia Railroad near the eastern limits of Atlanta, and

Whereas, By an agreement dated the 15th day of November,

1900, between the Lessees and the West Point Company, the latter company was admitted to the joint use of said terminals of the Lessees which are being enlarged, and are to be further enlarged by the construction of an additional freight house and other facilities, and

Whereas, It is deemed desirable that the Lessees should become the owners of all improvements on their said terminals in Atlanta, and all property and improvements owned or held under lease by the Louisville Company and West Point Company, whether said property is to be utilized for the enlargement of said terminal facilities or held for future needs, and

Whereas, It is desired to arrange for the joint use of all these said terminal facilities by the three parties hereto, on terms hereinafter stated,

Now, therefore, In consideration of the covenants herein contained and the sum of one ($1.00) dollar from each to the other paid, the receipt of which is hereby acknowledged, it is agreed between the parties hereto as follows:

Article I.

1. The Lessees, for and during the residue of the term of their lease from The Georgia Railroad & Banking Company, dated May 7, 1881, to-wit, until the first day of April, 1980, hereby appropriate, yield, devote, and turn over to and for the accomplishment of the purposes of this agreement, the following described property, to-wit:

The roadbed, right-of-way, and all other property and real estate, beginning at Central Avenue, at the connection with the
110 tracks of the Western & Atlantic Railroad, and extending east between the property lines of the Georgia Railroad as they may vary (said property being substantially bounded on the north by Decatur Street, and on the south by East Hunter Street, Oakland Cemetery and property owned by other parties) to a point eleven hundred (1100) feet east of the eastern connection of the Atlanta Belt Line with the tracks of the Georgia Railroad as it now exists; but excepting therefrom so much of said property as is leased to the Southern Railway by lease dated January 1, 1878; (the foregoing described property being subject, however, to the terms of a certain lease from the Lessees to the Atlanta Belt Line Company, dated the 30th day of November, 1900). Together with all the existing tracks, buildings, structures, switches, turnouts, and all improvements thereon, of whatsoever character or description; and grant and insure to the third party, until the first day of July, 1907, full, free, and uninterrupted right of entry upon said property for the purpose of relocating, rearranging, and raising, as may be found necessary, the existing grades, tracks, switches, turnouts, roadways, and structures, and of constructing thereon such additional tracks, switches, turnouts, and structures as are hereinafter provided for, including additional freight warehouse.

2. The West Point Company, for itself and as Lessee of the At-

lanta Belt Line Railroad, hereby agrees to convey, or cause to be conveyed, to the Lessees, all right, title, and interest which it may, by virtue of certain leases dated November 30, 1900, possess in the following described property, to-wit:

A freight warehouse adjoining the freight warehouse of the Georgia Railroad, near Central Avenue; a freight warehouse and other property in the vicinity of Pratt Street, bounded on the south by the Georgia Railroad, on the north by Decatur Street; a terminal yard near Hulsey Station, and real estate, tracks, "Y" tracks and terminals between said "Y" tracks near the eastern limits of Atlanta, together with tracks, trestles, and all other improvements thereon, including roundhouse, turntable, boiler room, machine shop, foreman's office, store-room, enginemen's room, etc., as hereinafter provided.

In consideration of the conveyance of said above mentioned property, the Lessees agree to pay the West Point Company the amount expended by it for the erection of freight station on property
117 belonging to the Lessees, namely, the sum of Eighteen Thousand, Two Hundred and Thirty-one Dollars and Forty-five Cents ($18,231.45); also to pay the West Point Company the sum expended by it for real estate, tracks, "Y" tracks, and other improvements near Hulsey Station, namely, the sum of Thirty-nine Thousand, Three Hundred and Seventy-five Dollars and Seventeen Cents ($39,375.17), together with interest on said latter sum from July 1, 1904, to date of payment. The West Point Company agrees that, when conveyance is made, the agreement with the Lessees for the joint use of terminal facilities, dated November 15, 1900, and which became effective December 1, 1900, shall thereupon be canceled and of no effect, and that this agreement shall in all respects be substituted therefor. The Lessees agree to appropriate, yield, devote, and turn over to and for the accomplishment of the purposes of this agreement, the property and improvements to be conveyed by the West Point Company, in like manner as the property appropriated under the provisions of Article I of this agreement.

3. The Louisville Company hereby binds itself to convey, or cause to be conveyed, to the Lessees, title to all the property to be covered by the contemplated improvements or to be held for future use, which is not now owned or controlled by the Lessees, consisting of certain lots lying south of the property of the Lessees between Central Avenue, East Hunter, and Washington Streets; the property on the corner of Factory Street and Georgia Railroad right of way which was acquired for the location of yard office; certain other lots lying south of and adjoining the property of the Lessees between Powell or Borne Street, Tennelle Street, and South Delta Place; also two lots east of South Delta Place adjoining the property of the West Point Company, as mentioned in Section 2 of this Article, all of which property is shown in red upon the General Plan hereinafter referred to. In consideration of such conveyance, the Lessees agree to reimburse the Louisville Company, in the manner hereinafter provided, for the net amount expended for said property, including interest thereon at five per cent (5%) to date of transfer; and, fur-

ther, hereby agree to appropriate, yield, devote, and turn over to and for the accomplishment of the purposes of this agreement the said realty, together with improvements, consisting of transfer
118 tracks, platforms, roadway, and team tracks, to be made thereon.

ARTICLE II.

Upon the property above described the Louisville Company has in part constructed and will continue until the first day of July, 1907, to construct, or to procure the construction and establishment of, the various improvements as shown upon revised General Plan F-1155, marked "Exhibit A," hereto attached and made a part hereof. The said general plan of improvements, including those in progress and to be completed, upon the property, comprises substantially the following:

1. The arrangement and reconstruction of tracks to conform to General Plan F-1155.

2. The construction of additional tracks in conformity with said General Plan F-1155, and in such manner as to utilize as fully as may be the right of way and adjacent property of the Georgia Railroad, as described in Section 1 of Article I.

3. The elevation, if need be, of the tracks across Grant Street, and the construction of additional tracks parallel and adjoining thereto and at the proper elevation to provide sufficient clearance above the street, and extending southwardly to the limits of the right of way of the Georgia Railroad; the extension, reconstruction or construction of underpasses at Piedmont Avenue, Butler, Powell (or Borne), and South Boulevard Streets.

4. The construction or reconstruction of the structure over Piedmont Avenue to carry the additional tracks over that street.

5. The construction of a coal terminal and team tracks at South Boulevard Street.

6. The construction of team tracks west of Butler Street.

7. A freight warehouse and transfer platform extending from Central Avenue to Piedmont Avenue, and transfer platforms
119 north and east of the Georgia Railroad's present freight depot.

8. A pillar crane and machinery platform between Piedmont Avenue and Butler Street.

9. A paved, inclined roadway from Piedmont Avenue to provide access to the present and the proposed new freight houses, and a paved roadway between said freight houses.

10. An office and storeroom, coal bin, coal chutes, and cinder pit near the roundhouse on the property of the Atlanta Belt Line hereinbefore mentioned.

11. A coach yard and a repair yard east of the coal bin, etc., mentioned in No. 10.

12. The right of way across the property for, and the contribution to be paid to, the city of Atlanta, such contribution to be equal to the cost of constructing a viaduct over the property of the Lessees creating an extension of Washington Street.

13. Transfer tracks and platforms and team tracks on property in the vicinity of Washington Street to be conveyed to the Lessees as specified in Section 3 of Article I.

14. A yard office on the corner of Factory Street and Georgia Railroad right of way and the real estate acquired for its location.

ARTICLE III.

Upon the property of the West Point Company above described, the Louisville Company has, at its own cost for all labor and materials, constructed a roundhouse and repair shop of the capacity and dimensions shown on revised General Plan F-1155 heretofore referred to, together with a turntable, coaling plant, water tank, sand house, oil house, tracks, boilers, engine, machines, tools, offices, and generally all such conveniences and appliances as appertain and belong to a locomotive roundhouse, and are necessary for the ordinary care of locomotives in service.

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ARTICLE IV.

In and during the progress of the work of constructing any or all of the improvements provided for in Articles II and III of this agreement, it is under-stood and agreed that the Louisville Company shall have the right to call upon the Lessees and the West Point Company, either or both, for such labor and materials as it may require, and when and so called upon the said Lessees and West Point Company will promptly respond to the request of the Louisville Company by furnishing all such labor and materials as and when required, charging therefor actual cost. Bills for all such labor and materials shall be rendered to and paid by the Louisville Company in the usual way. It is agreed that the work of rearranging, reconstructing, and adding to the facilities in accordance with revised General Plan F-1155, shall be diligently pro-ecuted, and the money advanced by the Louisville Company to pay all expenditures on this account made prior to July 1, 1907; and that by contract bearing even date herewith, all moneys expended by said Louisville Company in rearranging, improving, adding to or creating additional facilities upon the property of the Lessees or upon property to be acquired, including the cost of such property, shall be repaid, with interest at five per cent (5%) per annum, to said Louisville Company by said Lessees; and that the amount paid, and all payments that may be made for additions to or improvements upon the property of the Lessees after July 1, 1907, shall be added to the amount or value of the property upon which rent and taxes are to be paid by the joint users under the terms of this contract as hereinafter provided. It is expected that the new freight warehouse, and freight yard alongside of it, and transfer platforms, and paved private street will be finished before July 1, 1907, but in the event that they are not completed until after July 1, 1907, then any amounts becoming due for their construction after that date shall be paid by the Louisville Company and added to the amount to be refunded by the Lessees at the rate of $30,000.00 per year, with interest at five per cent.

Article V.

Rent and Taxes.

Upon completion of the improvements herein contemplated
121 and provided for, the entire properties before described, as well as the existing facilities (subject, nevertheless, to the changes to be made thereto) as the additions and improvements to be provided by the Louisville Company, shall become a joint railroad terminal, to be used in common by the parties hereto, upon and subject to the following terms, stipulations and conditions:

1. For the purposes of this agreement, the value of the property of the Lessees, fully described in Section 1 of Article 1, is hereby fixed at One Million, Five Hundred Thousand Dollars ($1,500,000.00), to which shall be added the sums to be paid the West Point Company as provided in Section 2 of Article I of this agreement, and the amount to be paid by said Lessees to the Louisville Company to fully reimburse it, with interest at five per cent (5%), for the amount advanced or that may be advanced prior to July 1, 1907, as herein provided, in acquiring property and in rearranging, reconstructing, and adding to the facilities; also any and all amounts that may, after July 1, 1907, be expended in acquiring property or in rearranging, adding to and creating additional facilities.

Upon this valuation the Lessees aforesaid shall receive, as rent, to be paid and provided for as hereinafter set out, interest at the rate of five per cent. (5%) per annum.

2. The aggregate of the interest charges or rent provided for in Section 1 of this Article shall be assumed and borne by the parties hereto in that proportion that the number of cars of all kinds, road engines, and cabooses of each of the parties leaving or entering the joint terminals in either direction, bears to the total number of cars, road engines, and cabooses entering and leaving the joint terminals in either direction.

3. Taxes, state, county, and municipal, and all other levies or rates lawfully imposed upon the terminal property, shall be paid by the Lessees; and when so paid, bills for their respective proportions shall be rendered to the West Point Company and Louisville Company, by taking the average of the several monthly proportions of cars of all kinds, road engines, and cabooses of the parties hereto handled on the terminal property for the year preceding that for which taxes are paid; and the average of such monthly proportion shall be used in dividing the taxes between the parties hereto.

122 ## Article VI.

Maintenance and Operation.

1. The maintenance of the jointly used property and all its improvements shall devolve upon the Superintendent of Terminals; and for the cost of such maintenance and all renewals in each month as reported by him, the Lessees shall render bills to the West Point Company and the Louisville Company each for its proportion of said

cost; and each party's proportion thereof shall be ascertained in the manner provided for the division of rent in Section 2 of Article V. Provided, that proper credit for all scrap rail and other scrap material shall be made to maintenance and renewal account before bills are rendered.

2. General supervision of the working of the terminal property is hereby lodged with a Board of Control, composed of the General Manager of the parties hereto; but, in order that the terminals may be operated as a whole, and without confusion or preference, but equally in the interests of each of the parties hereto, it is understood and agreed as follows:

(*a*) Yards. The terminal yards shall be immediately in charge of a Superintendent of Terminals, appointed by unanimous action of the Board of Control, who shall be a joint officer, and under whom shall be and to whom shall report all officers, agents, and employes of the joint terminals.

(*b*) Shop and Roundhouse. The shop and roundhouse and all the adjunct facilities for the care and repair of the locomotives of the parties hereto, shall be in charge of a competent Mechanical Foreman, to be appointed by the Superintendent of Terminals, with the approval of the Board of Control; and he shall appoint and employ, with the approval of the Superintendent of Terminals, and shall be assisted by such engineers and firemen, machinists, helpers, hostlers and laborers, car foremen, inspectors, repairers and cleaners as may be necessary to expeditiously handle and care for, and to make necessary light running repairs to, the locomotives and cars of the parties hereto.

123 (*c*) Freight Houses. The freight houses, transfer platforms, and team delivery track shall be in charge of a joint local agent, to be appointed by the Superintendent of Terminals, and shall be aided by a cashier, and by such clerks, truckmen, porters and laborers as may be necessary for the prompt and ready receiving, delivery, and transfer of freights. Any space in them, or in the coal chutes, available for lease to consignees or shippers, shall be fairly and equitably apportioned for the benefit of the traffic interests of the parties hereto by the Board of Control.

(*d*) Switch Engines. The requisite number of switch engines shall be furnished jointly by the parties hereto, and the quota of switching power to be supplied by each shall be based upon the relative proportions of work performed for each of the parties hereto, to be determined by the proportion of the whole number of cars of all kinds handled for each party during the period of twelve months in and out of the terminal yard. Provided, that whenever, in the opinion of the Superintendent of Terminals, the switching power furnished by any of the parties hereto is not proportionate to the switching service performed for such party, then he shall call upon the line in deficiency for additional switching power, and the line so called upon shall immediately make good its deficiency by supplying whatever power may be demanded, but subject, nevertheless, to such readjustment upon demand as may by proper investigation be shown to be necessary, the prime intent being that the quota of

switching power furnished by each of the parties hereto shall bear a just relation to the work performed. To the end that each party hereto shall furnish a proportion of the switching engines corresponding in economic efficiency to the respective proportions of work to be performed for its account, it is agreed that a rental of five dollars ($5.00) per day shall be allowed for each engine furnished with a tractive power of not less than fifteen thousand (15,000) pounds nor more than twenty-four thousand (24,000) pounds, and a rental of six dollars ($6.00) per day for each engine furnished with tractive power of more than twenty-four thousand (24,000) pounds; such rental to be included in the expense of operation and to be apportioned as provided in Section 1 of this Article.

The Managers of the respective parties hereto shall, upon the basis herein provided, agree upon the switching power to be
124 furnished by each of the parties, and shall make any readjustment that may from time to time prove to be necessary; provided that until the expiration, or during the first period of twelve months above referred to, switch engines shall be supplied upon an agreed estimate.

(*e*) Fuel, Water, and Supplies. The Lessees will furnish all fuel, water, and supplies, to be paid for by the parties hereto as herein provided for in Article VII, under the head of "Operating Expenses"; but it is understood and agreed that the Superintendent of Terminals, or the Mechanical Foreman, shall be at liberty to call upon, and shall be supplied by any of the parties hereto with such parts, material and supplies as may be needed in the repairs of cars and locomotives; and generally such material and supplies as may be requested by the Superintendent of Terminals or by the Mechanical Foreman. For all such material and supplies, proper credit shall be made to the party furnishing them.

(*f*) Rules. The Board of Control shall formulate and adopt a set of rules for the government of employes and for the operation of the terminals.

Article VII.

Operating Expenses.

All operating expenses for yard, shop, and roundhouse, switching, freight houses and transfer, fuel, water and light, for buildings, offices, shops and roundhouse, shall be paid by the Lessees, distributed to the usual accounts, and divided as follows:

1. Yard Expenses:

The aggregate wages of the Superintendent of Terminals and his office force, yard foremen, engineers and firemen, switchmen and laborers engaged in yard service, and all other expenses immediately and properly chargeable to the shifting of cars in the yards, marshalling and distributing of trains, whether freight or passenger, switching industry tracks within the yard limits, including fuel, water and supplies for, and ordinary running repairs to,
125 switch engines, care of and cleaning passenger cars, shall be computed monthly and bills for their respective proportions

shall be rendered to the West Point Company and Louisville Company. The proportion to be paid by each shall be ascertained in the manner provided for the division of rents in Section 2, Article V.

2. Shop and Roundhouse Expenses:

(*a*) Locomotives. The aggregate wages of Mechanical Foreman, assistants, clerks, hostlers, cleaners, and laborers, and all other expenses incident and immediately and properly chargeable to the care, cleaning, coaling, and watering of locomotives, whether for road service or switching, shall be computed monthly. Provided, however, that the expenses chargeable to road service and to switching service shall be kept separately.

The aggregate expenses connected with road service locomotives shall be divided between the parties hereto in the same proportion that the number of such locomotives of the respective parties bears to the whole number of road locomotives cared for at the roundhouse.

The expenses connected with the care of the switching service locomotives shall be divided between the parties hereto on the same basis that switch engines are agreed to be furnished by the respective parties under the terms of this agreement.

(*b*) Locomotive Repairs. Each party shall pay actual cost of running repairs to locomotives in road service for labor and material, plus ten per cent (10%), less credit for any material furnished or scrap saved.

(*c*) Car Repairs. Each party shall pay actual cost of car repairs made for its account, plus ten per cent (10%), less credit for any material furnis-ed or scrap saved, all of which shall be reported to the respective parties in detail, with car initial and number, by the Superintendent of Terminals; settlement for foreign car repairs to be made subsequently with the owners direct, under M. C. B. rules, by the party hereto for whose account any foreign cars may have been repaired.

(*d*) Fuel. All fuel for locomotives shall be supplied by the respective parties hereto, except that the Lessees may be called
126 upon for small amounts as a supplement, and they shall be paid for coal furnished on the tenders of road locomotives of either the West Point Company or the Louisville Company, actual cost plus four (4) cents per ton for waste. Wood for firing up locomotives shall be furnished at cost plus ten (10) cents per cord. Provided that wood and fuel for switching locomotives, being for joint service, supplied by either party hereto shall be invoiced at actual cost plus ten (10) cents per cord for wood and four (4) cents per ton for coal, and the amount thereof added to the cost of yard expenses.

Coal for passenger cars shall be similarly supplied and paid for on the same basis as fuel for locomotives.

(*e*) Water. Water for locomotives in road service shall be charged at actual cost.

Water for switch engines and for all other services or purposes, shall be added to the expense of yard, shop, and round-house, freight house and offices severally, according to the purpose for which it was used.

(*f*) Oil and Waste. Oil and waste and other supplies for all locomotives and cars shall be supplied by the Lessees when required, and shall be charged as follows:

When supplied to locomotives in road service, or passenger cars, they shall be charged at cost direct to the party to this agreement for whose use they are supplied. When supplied for switch engines, freight cars, or other purposes, it shall be added to the expenses of the yard or shop and roundhouse severally, according to the purpose for which they were used.

(*g*) Agency. The agency expenses of every character in offices, freight houses, and transfer platforms, for salaries, light, heat, water, and supplies, except exclusive stationery, shall be divided between the parties hereto in the same proportion *shall* the tonnage of freight of each party billed locally to and from Atlanta bears to the whole freight tonnage so billed at said agency. Provided, however, that should either party require the contents of its cars destined to points beyond Atlanta to be transferred for any purpose other than by reason of defective condition, it shall bear the entire cost of such transfer.

127 ARTICLE VIII.

General.

1. All accounting under the provisions of this agreement shall be performed by the accounting department of the Lessees, for which they shall receive reasonable compensation, as may be determined from time to time by the Board of Control. Proportions and percentages of Rent, Maintenance, and Operating Expenses shall be computed monthly, and bills based thereon rendered promptly, and shall be paid on or before the 25th day of the month next after the month for which such bills are rendered, unless exception be taken thereto for errors or other good cause, in which event the excepted bill shall be promptly returned with the needful memorandum of the error or items excepted to, when correction, if proper, shall be made and the bill returned for payment; provided, that if errors or irregularities are inconsequential, bills shall be paid and such errors or irregularities adjusted in subsequent month or months.

2. Cars switched locally from and to other railroads, and to and from industries at or near Atlanta, but without the limit of the terminals covered by this agreement, and situated upon the tracks of the parties thereto, respectively, shall not be deemed as leaving the terminals within the meaning of Section 2 of Article V, and the switching charges collected in each case shall be credited to and deducted from the yard expenses before prorating the said expenses between the parties hereto.

3. All other extraneous revenue for rents or for service performed for individuals or companies other than the parties hereto, or that may be collected from any source, shall be credited to and deducted as may be proper from the rent charges or from the expenses of that particular service from which said revenue may arise.

4. Expenses incurred or damages paid by reason of accidents in the yards or terminals, resulting in injuries to employes or others, or in damage to equipment, when due to the acts or negligence of joint or common employes, shall be added to yard expenses (Sec. 1, Art. VII) for the months in which said accident- occur, or
128 for the month in which payment is made, but in case of a judgment in a suit at law, the party sued shall receive from the other parties prorata payments of judgment and law expenses other than counsel fees, based on the proportion of yard expenses for the month in which the damage or injury sued for arose or occurred. But each company shall assume personal responsibility for the negligence of its own separate employes and pay its own counsel fees.

The Superintendent of Terminals may settle claims for personal injuries received, as above, by joint employes, or by others who are not employes of either of the parties hereto, or for damages to property not exceeding three hundred dollars ($300.00), and charge all of the parties their proportion of such settlement in accordance with the terms of the immediately preceding paragraph; but claims in excess of three hundred dollars ($300.00) shall be submitted by said Superintendent of Terminals to all of the parties before settlement, unless otherwise agreed.

The Local Counsel and his assistant, termed Law Clerk, employed by the Lessees at Atlanta, shall assist the Superintendent of Terminals in investigating all accidents and claims for damages, and in settling same without suit under his direction, and each party hereto shall pay the same proportion of seventy-five per cent. (75%) of their salaries that it pays for the yard expenses. Provided, that the Board of Control shall change or discontinue the arrangement with such counsel whenever, in its opinion, it may be desirable to do so.

When claims are made for any cause which the Superintendent of Terminals can not settle in accordance with the preceding paragraphs, he will submit such claims to the General Counsel of each of the parties hereto, with a full report of the facts, whereupon said General Counsel shall all together determine the course of procedure.

In case of loss or damage to freight, each company will be individually responsible, so far as the separate business is concerned, for the conduct of the common or joint employes, said loss or damage to be borne and paid by each company individually, as though the business was handled by its own separate employes; and any loss or damage of this character occurring by the negligence of the joint or common agent shall be adjusted direct with him by the road interested.

5. The joint agent shall be appointed by the Superintend-
129 ent of Terminals with the approval of the Board of Control. In the management of the business of each of the parties hereto, he will report to and receive instructions from the Superintendent of Terminals. He will likewise observe the instructions

issued by the proper officers of the several companies relating to the business of their respective departments.

It is understood that the joint or common agent shall give a separate bond to each company, and any default or loss of money shall be a separate matter of adjustment with the agent direct by the company interested.

6. All disbursements for repairs, maintenance, and operation, arising under this agreement, shall, as heretofore provided, be made by the Lessees; but it is distinctly agreed between the parties hereto, that each party shall be separately liable for its own pro rata of expenses, payments, and liabilities herein undertaken or promised by it to be performed, and not for the pro rata payment for which any other party is liable hereunder, or for the performance of any duty undertaken by the other party or parties hereto, this being an arrangement for the common use of terminals and not a partnership between the parties hereto.

7. No additions to the terminal plan or facilities as described herein and shown on plan F-1155, shall be made after July 1, 1907, without the consent of all the parties hereto; but in the event of such additions being made after said date with the consent of the parties hereto, the cost of them and of all improvements on and additions to the properties herein described, by whichever party made, shall be added to the aggregate value of all the property, and interest for rental shall thereafter be computed on the augmented amount.

8. No other railroad shall be admitted to the use of the joint terminals in any manner or respect, without full accord and consent of all the parties hereto. But in the event of such admission, the terms shall be covered by an agreement supplemental hereto.

9. All matters of difference that may arise from the operation of the terminals or as to the construction of any section or article
130 of this agreement, or of any of the stipulations hereof, that can not be determined by the Superintendent of Terminals, shall be referred to and settled by the Board of Control; but failing unanimous agreement, the matter at issue shall be referred to arbitration. If the matter in dispute concern or arise between any two of the parties hereto, then each party shall choose an arbitrator and the two thus chosen shall choose the third. If the matter in dispute concern or arise between all parties hereto, then each party shall choose an arbitrator; and in either case the award of the arbitrators, or any two of them, shall be binding and conclusive upon the parties hereto.

It is distinctly understood and agreed that the facilities covered by this agreement shall be used by the parties hereto, upon the terms hereinabove set forth, as their principal local freight terminals in the city of Atlanta, for a period of not less than ten (10) years from the date hereof, unless otherwise arranged by mutual agreement.

The terms of interest or rental and the valuation of property covered by this agreement shall be revised and readjusted at intervals of twenty (20) years from July 1, 1904. In case the parties hereto shall be unable to agree upon the rates of interest or rental and

valuations, said rates of interest, rental, and valuations shall be determined by arbitration in accordance with the provisions of Section 8 of Article VIII of this agreement.

In witness whereof, the lessees have caused their General Manager to sign these presents, and the West Point Company and Louisville Company have caused their Presidents to sign these presents, and their corporate seals to be affixed hereunto, the day and year first above written.

Executed in triplicate.

LOUISVILLE & NASHVILLE RAILROAD CO. AND
ATLANTIC COAST LINE RAILROAD CO.,
Lessees of the Georgia Railroad.

(Signed) By THOS. K. SCOTT, *General Manager.*

Signed, sealed, and delivered in the presence of:

(Signed) F. E. TYLER.
(Signed) E. J. MULHERIN,
[NOTARIAL SEAL.] *Notary Public, Richmond Co., Ga.*

131 ATLANTA & WEST POINT RAILROAD CO.,

[A. & W. R. R. Co. Seal.]

(Signed) By CHAS. A. WICKERSHAM,
President & General Manager.

Attest:
(Signed) F. H. HILL, *Secretary.*

Signed, sealed, and delivered in the presence of:

(Signed) A. A. PEARSON,
(Signed) MOULTRIE HITT,
Notary Public, Fulton Co., Ga.

LOUISVILLE & NASHVILLE RAILROAD CO.,

[L. & N. R. R. Co. Seal.]

(Signed) By M. H. SMITH, *President.*

Attest:
(Signed) W. H. BRUCE, *Secretary.*

Signed, sealed, and delivered in the presence of:

(Signed) M. J. REEDY.
[NOTARIAL SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson Co., Ky.

[Indorsed on Back:] U. S. Circuit Court of Appeals, Fifth Circuit. No. 2417. Wm. A. Wright, Comptroller, Appellant, vs. L. & N. R. R. Co., A. C. L. R. R. Co., Appellees. Copy stipulation. Jos. B. Cumming, Alex. C. King, Solicitors for Appellees and Cross-Appellants.

132 That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument in Part and Continuance.

Extract from the Minutes of October 17th, 1912.

No. 2417.

WILLIAM A. WRIGHT
versus
LOUISVILLE & NASHVILLE RAILROAD COMPANY et al., etc.

On this day this cause was regularly called, and after argument by Samuel H. Sibley, Esq., for Appellant and Cross-Appellee, and Jos. B. Cumming, Esq., for Appellees and Cross-Appellants, was continued until Friday, October 18th, 1912, at 10 o'clock A. M., for further argument.

133 *Continued Argument and Submission.*

Extract from the Minutes of October 18, 1912.

No. 2417.

WILLIAM A. WRIGHT
versus
LOUISVILLE & NASHVILLE RAILROAD CO. et al., etc.

On this day this cause was called for further hearing, and after argument by John C. Hart, Esq., for Appellant, and Cross-Appellee, and Alex. C. King, Esq., for Appellees and Cross-Appellants, was submitted to the Court.

Opinion of the Court.

Filed January 14th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

134 No. 2417.

WILLIAM A. WRIGHT
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

Appeal and Cross Appeal from the United States District Court for the Northern District of Georgia.

Before Pardee and Shelby, Circuit Judges, and Meek, District Judge.

By the COURT:

For the reasons given in the opinion of the trial Judge found in the transcript, the decree appealed from is affirmed.

The costs of appeal to be divided equally between the parties.

Judgment.

Extract from the Minutes of January 14, 1913.

135 No. 2417.

WILLIAM A. WRIGHT
versus
LOUISVILLE & NASHVILLE RAILROAD CO. & ATLANTIC COAST LINE RAILROAD CO.

and

LOUISVILLE & NASHVILLE RAILROAD CO. & ATLANTIC COAST LINE RAILROAD CO.
versus
WILLIAM A. WRIGHT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed that the decree of the said District Court, in this cause, be, and the same is hereby affirmed;

136 It is further ordered, adjudged and decreed that the Appellant and Cross-Appellee, William A. Wright, and the surety on his appeal bond herein, Philip Cook, be condemned, in

solido, to pay one-half of the costs of this cause in this Court, and that the Appellees and Cross-Appellants, Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, and the surety on their appeal bond herein, Thomas K. Scott, be condemned, in solido, to pay one-half of the costs of this cause in this Court, for all of which execution may be issued out of said District Court.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

137 I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 132 to 136 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2417, wherein William A. Wright is Appellant and Cross-Appellee, and Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company are Appellees and Cross-Appellants, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record and supplemental record numbered from 1 to 131 are identical with the
138 printed record and supplemental record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 2nd day of April, A. D. 1913.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

139 In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2417.

WILLIAM A. WRIGHT, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Appellees,

and

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Cross-Appellants,
vs.
WILLIAM A. WRIGHT, Cross-Appellee.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States, was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed Writ of Certiorari, I now hereby certify that on the 20th day of June, A. D. 1913, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

140 "In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2417.

WILLIAM A. WRIGHT, Comptroller General, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Appellees,

and

LOUISVILLE & NASHVILLE R. R. COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Cross-Appellants,
vs.
WILLIAM A. WRIGHT, Comptroller General, Cross-Appellee.

The Supreme Court of the United States having granted a writ of certiorari in the above stated case, commanding that the record therein be certified and sent up by the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit to the Supreme Court of the United States; it is hereby

Agreed and Stipulated between counsel for the respective parties above named that the certified copy of the record in the above stated case filed by William A. Wright, Comptroller General, as petitioner, for writ of certiorari, with his petition for said writ in the Supreme Court of the United States may be taken as and for a sufficient return to the said writ of certiorari and may be considered as sent up by the Clerk of the said United States Circuit Court of Appeals of the Fifth Circuit in response to said writ of certiorari.

This 16th day of June, A. D. 1913.

(Signed) THOMAS S. FELDER,
(Signed) JOHN C. HART,
(Signed) SAM'L H. SIBLEY,
Solicitors for William A. Wright, Comptroller General, etc.
(Signed) JOS. B. & BRYAN CUMMING,
(Signed) McDANIEL & BLACK,
(Signed) TYE, PEEPLES & JORDON,
(Signed) R. C. & PHILIP ALSTON,
(Signed) KING & SPALDING AND UNDERWOOD,
Solicitors for Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Co."

I further certify that the above is a true and correct copy
141 of said stipulation and of the whole thereof.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 20th day of June, A. D. 1913.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

142 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which William A. Wright, Comptroller General of the State of Georgia, is appellant, and Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company are appellees, (on appeal and cross-appeal), No. 2417, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal and cross-appeal from the District Court of the United States for the Northern District of Georgia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the

Supreme Court of the United States, do hereby command
143 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

144 [Endorsed:] File No. 23,667. Supreme Court of the United States, No. 1092, October Term, 1912. William A. Wright, Comptroller General, etc., vs. Louisville & Nashville Railroad Company et al. Writ of Certiorari.

[Endorsed:] 535B/23667. No. 2417. United States Circuit Court of Appeals for the Fifth Circuit. William W. Wright vs. Louisville & Nashville R. R. Co. & Atlantic Coast Line R. R. Co. and Louisville & Nashville R. R. Co. & Atlantic Coast Line Railroad Co. vs. William A. Wright. Writ of Certiorari, and Return Thereto.

145 [Endorsed:] File No. 23,667. Supreme Court U. S., October term, 1913. Term No. 535. William W. Wright, Petitioner, vs. Louisville & Nashville Railroad Company. Writ of certiorari and return. Filed June 24, 1913.

145½ Supreme Court of the United States.

No. 535, October Term, 1913.

WILLIAM A. WRIGHT, Comptroller General of the State of Georgia, Petitioner,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY et al.

On consideration of the petition for a cross-writ of certiorari herein,

It is now here ordered by the Court that the said petition be, and the same is hereby, granted.

October 20, 1913.

146 In the Supreme Court of the United States, October Term, 1913.

No. 535.

WILLIAM A. WRIGHT, Comptroller General, Petitioner for Certiorari,

vs.

LOUISVILLE & NASHVILLE RAILROAD and ATLANTIC COAST LINE RAILROAD COMPANY, Respondents,

and

LOUISVILLE & NASHVILLE R. R. COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Cross-Petitioners for Certiorari,

vs.

WILLIAM A. WRIGHT, Comptroller General, Cross-Respondent.

The Supreme Court of the United States having granted the Cross-Petition of the Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company for an additional writ of certiorari in the above stated case, commanding that the record therein be certified and sent up by the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit to the Supreme Court of the United States; it is hereby

Agreed and Stipulated between counsel for the respecctive parties that the Certified Copy of the Record in the above stated case now on file in the Supreme Court of the United States, in said

147 cause, with the original and *corss*-petitions for writ of certiorari, be taken as and for a sufficient return to said cross writ of certiorari and may be considered as sent up by the Clerk of the United States Circuit Court of Appeals of the Fifth Circuit in response to said cross writ of certiorari.

This 7th day of November, A. D. 1913.

T. S. FELDER, *Attorney General;*
JNO. C. HART,
SAM'L H. SIBLEY,
Solicitors for William A. Wright, Comptroller General, etc.

JOS. B. CUMMING,
ALEX. C. KING,
Solicitors for Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Co.

JOS. B. & BRYAN CUMMING,
McDANIEL & BLACK.
TYE, PEEPLES & JORDON,
R. C. & PHILIP H. ALSTON,
KING & SPALDING AND UNDERWOOD,
Counsel for Louisville & Nashville R. R. Co. and Atlantic Coast Line R. R. Co.

[Endorsed:] 535/23667.

148 [Endorsed:] File No. 23,667. Supreme Court U. S., October term, 1913. Term No. 535. William A. Wright, Comptroller General, etc., Petitioner, vs. Louisville & Nashville R. R. Co. et al. Stipulation that transcript of record on file may be taken as a return to cross-writ of certiorari. Filed November 10, 1913.

PETITION FOR A WRIT OF CERTIORARI

Supreme Court, U. S.
FILED.
MAY 2 1913
JAMES H. McKENNEY,
CLERK.

No. ~~1062.~~ 585 162

In The Supreme Court of the United States

WILLIAM A. WRIGHT,
Comptroller General of the State of Georgia
PETITIONER

vs.

Louisville & Nashville Railroad Company
Atlantic Coast Line Railroad Company
RESPONDENTS

Petition for Writ of Certiorari

T. S. FELDER,
Attorney General.
JOHN C. HART,
SAML. H. SIBLEY,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE

UNITED STATES.

WILLIAM A. WRIGHT,

Comptroller General of the State of Georgia,

Petitioner.

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondents.

Petition for Writ of Certiorari.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of William A. Wright, Comptroller-General of the State of Georgia, shows:

Your petitioner is a citizen of the State of Georgia, and Louisville & Nashville Railroad Company is a corporation, under the laws of the State of Kentucky, and Atlantic Coast Line Railroad Company is a corporation under the laws of the State of Virginia.

Your petitioner is charged under the laws of Georgia with the duty of collecting State, county, municipal and school district taxes from the railroad companies operating in said State; all property being required by the Constitution and laws of said State to be taxed ad valorem and uniformly.

In the year 1910 the respondents were in possession of and operating a railroad in said State known as the Georgia Railroad, and in connection therewith were using certain rolling stock, terminal properties, and had certain stocks, bonds, and other personal property; and in pursuance of his said duty petitioner called upon respondents to make a return of said property for taxation as required by law. Respondents failed and refused so to do, and on July 26, 1910 petitioner, as required by law, assessed said properties for taxation on the best information obtainable, valuing the railroad, rolling stock, and franchise of the railroad from Barnett to Washington at an aggregate of $240,000; that from Atlanta to Augusta and that from Union Point to Athens at an aggregate of $14,155,600; including stocks and bonds, $1,348,400; the terminals at Atlanta known as the Atlanta Joint Terminals at $2,813,786; and the Augusta Terminals at $325,000.

Thereupon respondents filed their bill in the Circuit Court of the United States for the Northern District of Georgia, setting up that said railroads and other properties assessed were held by them as successors in title of W. M. Wadley, who in May, 1881, had leased them for ninety-nine years from the Georgia Railroad and Banking Company at a fixed annual rental; that said company had been chartered in 1833 to build said railroads, (except the said railroad from Barnett to Washington) and had built them, and that by charter contract "the stock of said company should be subject to a tax not to exceed one half per centum on the net income of their investments"; that said contract had been held to be irrepealable; that respondents had no title to said property, but a mere usufruct in it; that they were not liable to taxes thereon;

and had offered to pay a tax measured by said charter contract. A decree was prayed declaring respondents not to be chargeable with taxes or any part of them on the property included in the assessment, and enjoining petitioner from collecting said taxes.

The answer contended that as to the original railroads, respondents had become under the said lease for 99 years the substantial owners of the property for the time being, and liable for taxes thereon, and that they had expressly agreed in said lease to pay all taxes on the property; that if not the substantial owners, they at least acquired a leasehold interest in said leased property that was very valuable, and liable to taxation against them; that under the terms of said lease respondents were to be paid at the termination of the lease for all betterments placed upon the property, and that respondents had out of their own unexempt funds placed betterments thereon in a sum of six millions of dollars; to the use of which they were entitled for 99 years, and to payment therefor at the end of the lease, and of which they were the owners; also that the rolling stock of $2,500,000 had been bought entirely by respondents with their own funds, and had never belonged to the Georgia Railroad & Banking Company, and never would, unless purchased and paid for at the termination of the lease; that the stocks and bonds assessed had been assigned to and vested in respondents by said lease; and that the Atlanta Terminals had been constructed by respondents with unexempt funds of their own, and on land the title to which was for the most part in respondents, and under a contract for their joint use for the period of said lease by respondents and other railroad companies, as a distinct and separate enterprise from the Georgia Rail-

road; and the answer prayed that petitioner be left free by the decree of the court to assess and collect ad valorem taxes on the whole property assessed but if any were not taxable ad valorem, then on such as was so taxable, under proper proceedings under the tax laws.

A stipulation of facts was entered into, in which it appeared that respondents had spent of their own money in betterments of the leased property since the lease a sum of $2,378,807. And in rolling stock now in use upon it (the rolling stock in existence at the time of the lease having been worn out, and the new rolling stock greatly exceeding the old both in number of items and value,) respondents had invested a sum of $2,254,705. On the Atlanta Terminals, erected and used as aforesaid, respondent had expended a sum of $1,453,507, and on the Augusta and Athens terminals a sum of $224,343. It was also agreed that respondents held, among other stocks and bonds assigned by the lease, $15,000 shares of stock in the Western Railway of Alabama, $440,000 of certificates of indebtedness of the Atlanta & West Point Railroad, and 4409 shares of stock of that road, $40,000 of bonds of the Monroe Railroad, and bonds of the Union Point and White Plains Railroad. It was also agreed that prior to the lease $700,000 raised by a sale of its bonds had been by the Georgia Railroad & Banking Company invested in the leased property, its total cost (excluding the Macon & Augusta Railroad not involved in this litigation) at the time of the lease having been to the Georgia Railroad & Banking Company, $8,577,564, though the capital "stock of said company" finally authorized by its charter was "not to exceed $4,000,000".

The case was tried on this stipulation of facts and the pleadings, and resulted in a decision in the Circuit court

that the Atlanta Joint Terminals were subject to ad valorem taxation, but that the respondents had no taxable interest in any of the other property, but the same was covered by the charter of the Georgia Railroad & Banking Company and taxable only as therein provided and a decree was entered enjoining petitioner from seeking to collect ad valorem taxes from respondents on any thing except said Atlanta Joint Terminals.

An appeal was thereupon prosecuted by petitioner to the Circuit Court of Appeals of the Fifth Circuit, which court affirmed the decree of the Circuit Court, its only opinion filed being as follows.

> "By the Court: For the reasons given in the opinion of the trial judge found in the transcript, the decree appealed from is affirmed."

Your petitioner shows that manifest error has been committed against him, and the State of Georgia in thus adopting the opinion of the trial court in the following particulars:

First: The Court erred in adjudging and decreeing that the lease executed by the Georgia Railroad & Banking Company exhibited in the bill did not vest any estate in the lessee, but only an usufruct which is not subject to be taxed; and in not holding that said lease vested in the lessee such an estate as rendered the lessee the substantial owner for the time being of the leased property, and liable for the taxes thereon.

Second: The court erred in not adjudging that the lessees under said lease had a valuable interest and estate in the leased property in respect of which they were taxable, even if not liable for taxes on the entire value of the leased property.

Third: The Court erred in not adjudging that the lessees were liable for ad valorem taxes on the betterments made by them on the leased property with their own money, for which they pay no increased rental, and for which they are to be reimbursed at the end of the lease.

Fourth: The court erred in holding that the rolling stock of the lessees is protected from ad valorem taxation by the provisions of the charter of the Georgia Railroad & Banking Company, the same having been purchased and paid for by the lessees and never having belonged to the Georgia Railroad & Banking Company.

Fifth: The court erred in decreeing that the betterments made by the lessees on the leased property are protected from ad valorem taxation by the charter of the Georgia Railroad & Banking Company, the same having been made by the lessees with their own money, for their own use and benefit, and which they will use without rent, and for which they will be paid before surrendering them at the end of the lease.

Sixth. The court erred in not holding that the charter contract as to taxation of the Georgia Railroad & Banking Company was personal to that company, and that respondents could take no advantage from it.

Seventh: The Court erred in not adjudging that the Augusta Terminal, and Athens extension and terminal are covered by said charter and not subject to ad valorem taxes, it appearing that each was constructed at the expense of the lessees, for their own use and benefit, that they pay no rent therefor, and will be compensated therefor at the termination of the lease.

Eighth: The court erred in not holding that the original leased property, in so far as it represented the

investment not of stock of the Georgia Railroad & Banking Company, but the investment of its bonds, especially seven hundred thousand dollars disclosed by the stipulation of facts to have been invested in steel rails, depots and round houses was subject to ad valorem taxation.

Ninth: The court erred in not holding the lessees liable for ad valorem taxation on the stocks and bonds assigned to them by said lease, especially the stock in the Western Railway of Alabama which is a corporation, of the State of Alabama, the debentures of the Atlanta and West Point Railroad, and the bonds of the Monroe Railroad.

Your petitioner presents herewith a complete certified transcript of the record in said cause, from an examination of which the full facts will more clearly appear; and presents herewith a brief in support of said assignments of errors.

Your petitioner shows that a writ of certiorari should issue not only because error has been committed, but the rights of a sovereign State of the United States are involved, and that affecting permanently the exercise of its sovereign right of taxation of a vast and rapidly growing property; and should said error not be corrected, there is hardly any limit to the extent to which taxable funds in the State may be withdrawn from taxation by investment in said leased railroad.

And your petitioner further shows that expressly upon the authority of the decision herein complained of, the right of the State of Georgia to tax other leased railroads in the State, to wit: the Augusta & Savannah & Southwestern Railroads, has been decided adversely to the State, and your petitioner has appealed said judgment directly to this court, and the same is now pending

for trial upon the docket of this court, to wit: the case of William A. Wright Comptroller-General of Georgia, vs. Central of Georgia Railway Company. And your petitioner shows that it is expedient that in deciding that case, which involves similar questions, the present case should also be before this court, that true and consistent justice may be done, and all possibility of conflicting adjudications respecting the same right may be avoided.

Wherefore your petitioner prays that this honorable court will grant a writ of certiorari directed to the Circuit Court of Appeals of the Fifth Circuit, directing that the record of said case be brought before this court for its decision, and that said decree, in so far as it is adverse to petitioner be reversed, and such judgment be given as is in accordance with law and equity.

WM. A. WRIGHT,
Comptroller-Gen. of Georgia.

THOS. S. FELDER,
Attorney-General of Georgia.

JOHN C. HART,
SAMUEL H. SIBLEY,
Counsel for Petitioner.

State of Georgia,
County of Fulton:

Personally appeared before me an officer authorized to administer oaths, William A. Wright, who being sworn says he has read the foregoing petition, and that the statements thereof are true.

WM. A. WRIGHT.

Sworn to and subscribed before me
this April 18, 1913.

W. H. HARRISON,
N. P. & Co. Com.

No._____

In The Supreme Court of the United States

WILLIAM A. WRIGHT,
Comptroller General of the State of Georgia
PETITIONER

vs.

Louisville & Nashville Railroad Company
Atlantic Coast Line Railroad Company
RESPONDENTS

Brief in Support of Petition for Certiorari

T. S. FELDER,
Attorney General.
JOHN C. HART,
SAML. H. SIBLEY,
Counsel for Petitioner.

It is not the purpose of this brief to argue fully the contentions of The State of Georgia in this case, but only to stress some of the most manifest points of error, and to show that it is expedient for the certiorari to issue for their correction. In the beginning, be it said, that the former practice of the Comptroller-General in assessing taxes cannot have the effect of depriving the State of taxes, or giving the respondents any right of exemption that they did not originally have. The organic law of the State, declares:

> Constitution of 1877, Art. 4, Sect. 1: "The right of taxation is a sovereign right, inalienable and indestructible . . . . and neither the General Assembly nor any nor all other departments of the government established by this Constitution shall ever *have the authority* . . . . to *limit or restrain* this right; and all laws, grants, contracts, and *all other acts whatsoever*, by said government or *any department* thereof to effect any of these purposes, shall be and are hereby declared to be *null and void for every purpose whatsoever*. . . . . "
>
> "Whether the expectations of the purchasers, or the *unbroken practice of the city heretofore may have been*, the mandate of the Constitution of 1877 is to tax all property save that expressly exempted by the Legislature under Constitutional authority if any is taxed. That this mandate may heretofore have been disregarded is no reason why it should not be obeyed now."
>
> Wells *vs.* Savannah, 181 U. S. at page 547.

I. Leasehold Interest Certainly Taxable.

The Constitution of Georgia, Art. 7, Sect. 2 declares:

> "Paragraph 1. All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax. . . . ."
>
> Paragraph 2 provides for certain exemptions of property.
>
> "Paragraph 4. All laws exempting property from taxation other than the property herein enumerated shall be void."
>
> "Paragraph 5. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party."

The Statutes of the State provide: Georgia Code of 1910:

> "Sect. 1002. All real and personal estate, whether owned by individuals or, corporations resident or nonresident, is liable to taxation.
>
> "Sect. 1008. All persons owning any mineral or timber interests or *any other interest or claim in or to land less than the fee*, shall return the same for taxation and pay taxes thereon the same as on other property.
>
> "Sect. 1032. The presidents of all railroad companies . . . . in this State shall be required to return on oath annually to the Comptroller-General the value *of the property of their respective companies*, each class or species of property to be separately named and valued, so far as may be practicable, to be taxed as other property of the people of the State . . . . "

Among the questions required to be answered by the taxpayers is this one:

"Sect. 1087. . . . . What is the value of your leases or leased privileges, or other assets of like character"

The Supreme Court of Georgia declares:

"It would be a work of supererogation at this late day to enter into a discussion, or cite authorities, to show that under the system of taxation prescribed by our Constitution the property of all persons and corporations, unless exempted, is not only to be taxed, but must be taxed on the basis of value. Under its provisions, all property of every kind, real estate, money, choses in action, moveables, are as a rule, not only subject to tax, but, taking value as a basis, subject to the same rate of tax . . . . The fundamental object sought to be accomplished under the provisions of our law in relation to taxation is equality, and that the rich man, the poor man, the corporation, the association, shall alike contribute to the support of the government on the basis of the value of the property owned, and that all taxation imposed in this state shall be in this equitable plan. . . . ."

Georgia B. & L. Ass. *vs.* Savannah, 109 Ga. at page 67.

In a case where the title to land was in the city which sought to tax it, the land being held under a perpetual lease on payment of ground rents, it was held taxable to the beneficial owner, the general principles of taxation in Georgia being thus stated:

"If the municipal government held all the values in the city as trustee for the owners or as security for purchase money, these values would be none the less taxable for that reason. The constitution of the State requires that taxation on property shall be ad valorem, and that when any

part is taxed, all shall be taxed which is subject for the time being to the taxing power in the given locality. This rule is wihtout exception. . . . . Relatively to the question of taxation it makes no substantial difference whether the estate or property of the beneficial owners be classed as realty or personalty; *whatever property of either kind belongs to them* is taxable ad valorem. . . . . The Constitution is imperative that all property is to be taxed ad valorem. The foundation principle of such a system is that those *who own and enjoy values* are to pay the taxes. The real owners of the money for which these lots would now sell on the market are the persons whom we have designated as owners, and it is upon the cash market value that taxes are assessable."

Wells *vs.* Savannah 87 Ga.

The owners of leasehold estates of not exceeding thirty years were held by this court taxable in respect thereof, though the fee was vested in a corporation which had a charter exemption:

"As long as different interests may exist in the same land, we think it plain that an exemption granted to the owner of the land in fee, does not extend to an exemption of an interest in the same land granted by the owner of the fee to another person as a lessee for a term of years. The two interests are totally distinct and the exemption of one plainly does not exempt the other. . . . . The contract of exemption did not in the most remote degree imply that the State would not thereafter, through its legislature, so change its mode of assessment as to reach the interest of a lessee directly and not through the owner of the fee. In so doing the State does not tax the owner of the land, nor the fee itself. It taxes what it had a right to tax, a separate and distinct interest in the

land, although the fee thereof be in the University, which cannot be taxed therefor."

"What is the exact interest of the lessee in the land leased to him it is not necessary here to determine. It is plain that he has some interest in it, and that interest is distinct from the fee, and may be taxed when the fee is exempt from taxation. In Elder vs. Wood, 208 U. S. 226 ante, decided by this court Jan. 27, 1908, it was held that a mere possessory right in a mining claim i nland to which the United States had title was a right separate from the fee, and might be taxed under a State statute, although the fee could not, because it was in the Government."

Jetton *vs.* University of the South, 208 U S. at pages 500 and 503.

While ordinarily ad valorem taxes are assessed on the value of the entire title, it being immaterial to the State who pays them, yet where the owner of one interest is not subject to ad valorem taxation, according to the constitution but the owner of another interest therein is subject, the interest which is subject to taxation is not relieved, but the owner thereof must pay taxes thereon. Section 1008 of the Code above quoted is peculiarly adapted to such a situation, in requiring interests less than the fee to be returned for taxation. Without doubt the lessees of this railroad are subject to be taxed ad valorem on *their interest in it*, whatever it may be. It is *property*. Their leasehold, whether an estate for years or a mere usufruct, was expressly granted to Wm. M. Wadley *and his assigns*.. It is therefore *assignable*, and has been several times actually assigned. It has *market value to the owners*. They are *the owners of that value*. Having no contract of exemption with the State, they owe ad valorem taxes on that market value.

It has been urged in argument that the State had provided no machinery for reaching such property. The court below made no such determination, but decided squarely that the lessees had *no interest in the property sought to be taxed.* Machinery could be provided in the future. This adjudication, if allowed to stand, will bind the State for all time.

But the machinery is adequate and simple. Its outlines have been quoted above. The owners of interests less than the fee are required to return them at their value. The express question is to be propounded, *"What is the value of your leases, leased privileges and other like assets?"* Railroad companies are to make their returns to the Comptroller-General on their property of all kinds just as other taxpayers of the State, must to other officers. Every intendment will be indulged to make the machinery provided accomplish the object of equal ad valorem taxation:

> "2. The Constitution of 1877 provides that 'all taxation shall be uniform upon the same class of subjects, and ad valorem upon all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.' Under this Constitution the General Assembly cannot lawfully either expressly exempt from taxation, or accomplish this result by *a failure to tax* any property, except that which in the Constitution itself the General Assembly is expressly authorized to exempt.
>
> "6. As the General Assembly has no power to exempt property from taxation by simply failing to provide proper machinery for the collection of the tax, a tax act will not be construed as failing so to provide, unless such construction is absolutely demanded by the terms of the act.

"9. When a tax act provides machinery ample in its nature to bring under taxation all of the property of an individual, such machinery may be used to bring under taxation the property of corporations."

Atlanta National Assen. *vs.* Stewart, 109 Ga. 80.

II. Betterments Made by Lessees.

From the stipulation of facts it appears:

The original cost of the Georgia Railroad, including the Washington Branch was $4,156,00. Prior to the lease in 1881, the Georgia Railroad & Banking Company had added $4,000,000 more to it, its total cost being then $8,577,564 of which $700,000 had been raised by issues of bonds, as now develops, and $44,000 was raised by a sale of new stock in 1870 as has always been known.

Since the lease in 1881, the respondents, the Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, have expended on it of their funds $6,311,363. Under the decision in this case, all of this vast and increasing sum is protected from ad valorem taxation (except the Washington Branch $156,000 and the $44,000 of new stock, and the Atlanta Terminals,) as "stock" of the Georgia Railroad & Banning Company.

The original charter of that company provided: "The *stock of said company* . . . . shall be subject to a tax not exceeding one half per cent of the net income of *their investments.*"

The words that limit the tax are "*not exceeding.*"

On Dec. 25, 1847, Acts of 1847, p. 192 Sect. 8. This charter was amended, the company accepting and acting on the amendment, as follows:

"The Georgia Railroad & Banking Company shall have and is hereby invested with full power to increase their capital to an amount *not exceeding* four millions of dollars, etc. . . . ."

This amendment became *part of the charter*, and limited the exempt capital to be invested by the *same words that the tax was limited*, to $4,000,000.

In the case of Wright vs. Georgia Railroad & Banking Company, 208 U. S. 420, this contract was construed as between the State and the *Georgia Railroad & Banking Company*. The lessees, respondents in this petition, *were not parties;* nor was the *lease once referred* to in the record. No question of estoppel or res judicata is involved therefore. It was there held, that though the *value of the property* was admitted to be $4,000,000 in excess of the authorized exempt capitol, still the Georgia Railroad & Banking Company could not be taxed ad valorem therefor, the excess being due to natural increase, alterations and betterments made by the company. It was also held that the words "stock of the company" included the property in which the capital was invested, and protected it from ad valorem taxation. These rulings were supposed by the trial judge to control the present issue. This supposition is based upon a wide misapprehension of the decision of this court, and of the facts of the present case. In the case cited, the taxation was sought against the Georgia Railroad and Banking Company, which had a tax contract with the State: these lessees have none. The increase of value was there an investment of the Georgia Railroad and Banking Company—"their investment"—; here it is the investment of a stranger, whose unexempt funds can by no stretch be regarded as "stock of the said company." There the

exempt company was supposed to be enjoying the income from its increased property and paying tax thereon according to its contract; here the income of the Georgia Railroad & Banking Company is *fixed by a lease*, and the entire income from and enjoyment of the increment accrues to the lessees, and to allow them to pay a small *income tax* on *their income*, instead of an ad valorem tax on their property, would be plainly to allow them to enjoy the exemption of another. Even the *Georgia Railroad & Banking Company* cannot invest funds arising from *new stock* or *bonds*, and not pay ad valorem tax on the investment. This was expressly adjudicated in the decree affirmed in the Wright case supra, as to the new stock; and intimated in the opinion as to the bonds. Much less would the investment of funds of a stranger to the contract be protected from such taxation. What the court held in the Wright case fairly appears in these extracts from the opinion:

> "An investment made nearly seventy-five years ago of $4,156,000 has now a value of $4,000,000 in excess of that cost. The *property is the same property*, the conceded fact is that through renewals, alterations and betterments made from time to time, and natural increase in the value of the road, this appreciation has come about. There has been no suggestion that there has been *any hiding away of capital added*, by either new stock, or by the use of bonds or other form of credit, nor that the improvements made from time to time, called renewals, alterations and betterments, have been other than the necessities of an enlarging business and the improved maintenance naturally demanded. There is no suggestion that there has been *bad faith in covering up taxable assets under cover of assets immune.*" . . . .

> "Undoubtedly, the State did not intend that any capital other than *that authorized,* and invested directly in this specific railroad should be immune. That is plain by the express limitation of the charter. . . . . That the intent was to exempt a capital of $4,156,00 is, for the purpose of the present question, the necessary foundation of the claim now being looked at. That was at the beginning mere subscribers promises to pay; next money in the treasury of the company. . . . . But this capital was intended to be the only means by which this line of railroad was to be constructed and equipped."
>
> Wright vs. Georgia Railroad and Banking Co. 208 U. S. at page 430, 431.

On page 426 it is said:

> "That 'stock' in the first clause means capital, and 'their investments' means the property into which *the companys capital* has gone, seems in any view you take of it, the most rational interpretation of the matter."

Very far from the rulings then made is the present holding, that foreign corporations, having no contract with the State, but having extensive railway systems of their own, may take the railroad that represented the "stock" of the Georgia Railroad & Banking Company, and enlarge and extend it and equip it with their own funds, and for their own benefit, to meet the needs of their adjacent systems; and screen their vast and increasing investments from just and equal taxation under a personal contract with another company; that other company having not a cent's interest in the increased income. Such an investment is not an investment of the *exempt "stock"* of the Georgia Railroad & Banking Company,

nor is the income from it the income of *"their investments."* The rent reserved in the lease would alone be such.

The Wright case cited supra did not hold that *nothing* that was appropriately invested in the Georgia Railroad could be taxed except by income, *no matter who invested it.* It held nothing as to the investments of *strangers to the contract;* and as to the Georgia Railroad & Banking Company itself the holding was not that it might make new investments of *new capital* without becoming subject to ad valorem taxation in respect thereto; but the decree which was affirmed held the *exact contrary,* that an investment of new capital raised by the sale of 440 shares of new stock, *was taxable ad valorem.* The decision that investments of new capital by the lessees is not so taxable is in the teeth of the judgment referred to, and also to the decision of the Georgia court:

> Georgia vs. Ga. R. R. & Bkg Co. 54 Ga. at page 427.

The question of liability of a lessee for taxation on his improvements on the leased premises was also considered in Jetton vs. University of the South, 208 U. S. at page 504.

> "It is said that although the lessee is bound to make improvements, he does not own them, even though their value is not to be taken into consideration against him when the lease is renewed. Whether he is the owner of the improvements until he is at some time paid for them is not material upon the question of the separate interests of the lessee and the owner of the fee, the ownership of the improvements being only material upon the question of the *value* of the interest of the lessee... The value of *whatever interest he has,* is to be

> assessed as real estate under the statute, and that value must be determined by the assessing officer. All we can say is that it is a separate interest distinct form that of the owner of the fee, and the assessment of that interest for taxation is not an assessment upon the interest of the university, and is not in violation of the exemption granted to it by the statute of 1858."

In the present case, the improvements are convenanted in the lease *to be paid for by the lessor,* at the termination of the lease for any cause: The lessees of this property hold and enjoy their improvements, and reap the income from them so long as the lease continues, without paying any increased rent for them, and receive pay at the end of the lease when they surrender them. If they assign the lease, the purchase price is fixed not only by the value of the original leasehold, but also by these valuable improvements, worth $6,000,000 *to use,* and worth that on *surrender of the lease,* and no doubt worth that in consequence *in the market.* And this without regard to where the technical *title* to the property may be as between lessor and lessee.

> "To which side the artificial logic of these niceties would incline the scale is immaterial, for the solid, practical subject of taxation must be dealt with on broader principles. The value of property consists in the use, and he who owns the use forever though on conditions subsequent, is the true owner of the property for the time being. . . . . Where taxation is ad valorem, values are the ultimate object of taxation, and they to whom the *values* belong ought to pay the taxes."
>
> Wells *vs.* Savannah, 87 Ga. 399 at center.

Even where no question of exemption of the lessor is in olved, and in cases of short term leases where the

whole taxes are charged to the lessor, it is universally held that the duty of paying taxes on *improvements added* by the lessee for which he pays no rent, are *due by the lessee.*

24 Cyc. 1075. 18 Am. and Eng. Ency Law, 651.

> "In the *absence of stipulation* in the lease the lessor is bound to pay the taxes on the property, but not *on the improvements* made by the lessee which the latter is entitled to remove or be *compensated for.*"

Sech vs. Good. 19 Mo. 501.

So the B. & O. R. R. Co. was held liable to pay taxes on the leasehold interest and improvements it had made on an exempt railroad:

P. W. & B. R. R. vs. Baltimore, 50 Md. 397.

And the New York Elevated Railroads are taxed, though built on exempt land:

N. Y. E. R. R. vs. New York, 82 N. Y. 459.

III. Rolling Stock and Stocks and Bonds.

The rolling stock of the lessees amounts to $2,254,705. The present items are many times more numerous and more valuable than that originally leased, which has been all worn out and discarded. This increase, if the rolling stock be considered as belonging by a sort of accretion to the railroads, is a betterment, and covered by the argument of the foregoing division. Strictly considered as it should be in a matter of tax exemption, each engine and car is a piece of personalty, bought and paid for by the lessees, and under their exclusive control. They will wear it out within the seventy years the lease has to run. They need never deliver any particular item to the

lessor. They are simply bound at the *end of the lease* "to return the personal property leased *in* personal property equal in value and as well adapted to its uses as it now is," to quote the lease. Meanwhile, they may have much or little rolling stock. They may buy and sell it, or destroy it. If a train is destroyed, it is *the loss* of the lessees, not of the lessor. The prsiovision of the lease that "all the property substituted for and added to that which is hereby rented and farmed out *shall be* the property of the party of the first part to the same extent as the original property for which it may be substituted or to which it may be added was the property of the party of the first part"—occurs in the portion of the lease dealing with the *return of all* the property, at the end of the lease, and *refers to that time.* It is as to the personal property a covenant to sell and deliver at that time. Until that time, the lessor gets no rent on it, loses nothing by the destruction of it, has no interest in it. The large amount of rolling stock is due not to the natural needs of the Georgia Railroad, but to the high stimulation resulting from its now being the connecting link between the railroad systems of the two lessees. See Record p——

The stocks and bonds held by the lessees under the lease are also vested in them. The language of the lease as to these things is that they are "assigned and transferred," and not simply "rented and farmed out." The *title* is vested in the lessees to these choses, until they shall be reassigned at the end of the lease.

While domestic stocks are not taxable in Georgia, stocks in foreign corporations are, and this very stock in the Western Railroad of Alabama was held taxable even in the hands of the Georgia Railroad & Banking Company prior to the latter's assignment and lease:

Wright vs. L. & N. R. R. 195 U. S. 219.

The certificates of indebtedness of the Atlanta and West Point Railroad, and bonds of Monroe Railroad, are ordinary choses in action and of course taxable.

IV. Contractual Restraint of Taxation is Personal.

It has been assumed, and is now asserted, that the limitation on the taxing power of the State in the charter of the Georgia Railroad & Banking Company is personal to that company, and does not run with the property, the Georgia Railroad. It is pertinent in dealing with that company as to *any taxes it may owe,* but *wholly irrelevant* in dealing with respondents about any taxes *they may owe.*

That a contract limiting the power of taxation does not follow the property, and is non-assignable without the express and clear consent of the State, and only at a time when it is permitted by its then Constitution to give such consent, is fully and finally settled by the decisions in:

Rochester *vs.* Rochester, 205 U. S. 236, 247.
Great Northern R. R. *vs.* Minnesota, 216 U. S. 206.
See also Pickard vs. E. T. R. R. 130 U. S. 637.
L. & N. R. R. vs. Palmes, 109 U. S. 244.
Morgan *vs.* Louisiana, 93 U. S. 217.

That this is not a *total exemption* from taxation but a special *mode of limited taxation,* does not alter the rule. The question is, "Is there a *contract which limits* the power of taxation?" if so, it is personal with the party with whom it is made and can pass to no other except by an express consent of the State equivalent to a new valid contract.

In Tucker vs. Ferguson, 22 Wall. 575, the language is:

> "It (the taxing power) may be *restrained by contract,* in special cases, for the public good, where such contracts are not forbidden, but there is no presumption in its favor. Every doubt should be resolved against it. Where it exists, it is *to be closely scrutinized,* and never permitted to extend *in scope* or duration beyond what the terms of the concession *clearly require.*"

In Rochester vs. Rochester, page 247, the broad expression used is "immunity from the exercise of governmental power."

In the Great Northern case, the contract was for an income tax as here. The contract was held non-assignable: p. 222.

In Stearns vs. Minnesota, 179 U. S. 255, Chief Justice White very clearly states the gist of the matter to consist in *any restraint of governmental power* by contract.

The only cases in which a commuted system of taxation is held to run with property are those where *land is granted* by the taxing power, with such a contract as an *incident of the tenure.*

See Great Northern Case 216 U. S. at page 232, 233.

None of th cases respecting the tax contract of the Georgia Railroad & Banking Company have involved its application to any third party. The Georgia cases were all decided *before the lease.* The case in 216 U. S. did not involve the lease, it not being mentioned in the record. It does not appear that it was ever brought to the official notice of the tax officers till 1910 when the tax returns of the lessor were declined in the beginning of this case. There is nothing in the charter which squints at any

permission by the State to transfer the special tax arrangement to any other person.

In 1881, when the lease was made, the State under its Constitution *could not give* such a consent.

The *lease did not undertake* to extend the benefit of the tax contract to the lessees, but on the contrary stipulated as follows:

> "And the party of the first part agrees to pay the taxes which may be *payable under the charter of the party of the first part,* on the rental hereinafter stipulated for or on so much thereof as may be taxable and all taxes if any which may become collectible by law from the party of the first part on the shares of its stock in the hands of its shareholders. But *all other taxes,* which may be payable *on the property and franchises,* which, or the control, use and enjoyment of which, is hereby rented, farmed out, assigned, or transferred to the party of the second part and his assigns, shall be paid by the party of the second part and his assigns."

This clearly contemplated that the lessor would pay an income tax on so much of the *income* as might be fairly attributable to the charter railroads (as distinguished from the Macon and Augusta railroad, which was also leased, but was not exempt) but that the lessees were to look out for all property taxes without reference to the special mode of taxation applicable to the lessor.

V. Special Reasons for Certiorari.

We respectfully submit that the record in this case should be reviewed by this court for these special reasons:

The decision is clearly against the ruling of this court in the case of Jetton vs. University of the South, supra,

in holding that the leasehold estate and betterments of respondents did not constitute a separate interest taxable to them, even if they be not liable for taxes on the fee.

The decision is against the judgment in the case of Wright vs. Georgia Railroad & Banking Company, supra, which decreed that the investment of new stock in this railroad was liable to ad valorem taxation; and *a fortiori,* the investment of the funds of strangers to the charter contract.

The decision is one affecting the rights of a sovereign state in the matter of permanent taxation of a considerable portion of her taxable wealth. Should the same stand, it will afford cover for an unlimited screening from taxation of property for the benefit, not of the Georgia Railroad & Banking Company, but for the benefit of other corporations to whom the State has never granted any special privilege in the premises.

The decision has been expressly followed, and treated as controlling in the decision of the case of Central of Geargia Railway Co. vs. Wright Comptroller-General, involving the taxation of two other leased railroads in Georgia. This latter case is now on the dockets of this court by appeal, and involves similar questions to those here involved. It is expedient that the court have before it both cases when it determines said appeal, in order that after full argument and consideration both may be decided in harmony and with correctness and that taxation may really be uniform upon the railroads of the State.

Respectfully submitted.

THOS. S. FELDER,
Attorney-General of Georgia.

JOHN C. HART,
SAMUEL H. SIBLEY,
Special Counsel.

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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1912

No. ~~1082.585~~ 162

WILLIAM A. WRIGHT, COMPTROLLER GENERAL,

PETITIONER,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
ATLANTIC COAST LINE RAILROAD COMPANY,

RESPONDENTS.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

JOS. B. CUMMING,
ALEX. C. KING,
Counsel for Respondents.

Appeal Pub. Co. Atlanta, Ga.

IN THE

Supreme Court of the United States

WILLIAM A. WRIGHT,
Comptroller General of the State of Georgia,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

In response to the petition for Writ of Certiorari, served upon them and for cause why the same should not be granted, the Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, as respondents thereto, show:

1st. That the taxation of these respondents which the decree of the Circuit Court enjoins is not an effort by the State of Georgia or its officers to levy or collect any tax which before this time it had ever attempted, or asserted any right, to collect, nor is it the levy by the Legislature of any new tax; but this decree simply prevents the Comp-

troller General of said State, after a settled practice of twenty-nine years, during which he had regarded the Georgia Railroad & Banking Company as the person in law charged with the payment of taxes upon its own property, and had collected the same from it and unsuccessfully sought to hold it for higher taxes, from departing from such method of taxation and from refusing to receive taxes from the owner, and now insisting on respondents, the lessees of said railroad, paying full taxes thereon as if they were the owners thereof.

No change in the taxing laws of the State are claimed to have taken place, calling for this revolution of method. Respondents therefore insist that this is not a case involving the rights of taxation asserted by the State through her legislative department; but merely a change made by a subordinate branch of the executive department, from its practice of twenty-nine (29) years, which practice has during that period been acquiesced in by every department of the State Government notwithstanding the fact that legislation regulating the taxation of railroads, and involving marked changes in other lines, has been from time to time enacted.

2nd. Further responding they aver, that under the law of Georgia where the interests in realty, making up the complete fee, are held by several persons, as for instance vendor retaining title, and vendee with a bond for title, life tenant and remainderman, liability for taxes is not divided, and each interest separately taxed; but such person as is regarded the owner, according to common law rules, pays taxes on the property for all interests.

Thus a life tenant pays on the fee simple estate, the holder of a bond for title, as the owner, pays the tax assessed on the entire value, and the vendor is not assessed on such land.

So, in the case of a lessee, the lessor, not the lessee pays the taxes on the whole estate.

3rd. So far as the Court finds the facts it is insisted that this Court will not reverse the Court below unless the finding is without any evidence to support it. Therefore all issues of fact must be considered settled in Respondents' favor.

4th. If the Respondents were right in their contention that under the law the lessor, the Georgia Railroad and Banking Company was liable for the taxes due to the State on its Railroads and appurtenances, then whether the property was taxable **ad valorem** or in some other manner the Georgia Railroad and Banking Company and not these Respondents were bound to return said property for taxation and pay whatever taxes were properly due thereon.

5th. That the return demanded of, and assessment made against, these Respondents was not an effort to reach Respondents' property, or to levy taxes on some separate interest therein which it was asserted Respondents owned; but an effort to assess the whole property and its entire value against Respondent instead of the Georgia Railroad and Banking Company and to refuse

6th. Respondents show that this case is not involved

in, nor should it be confused with the case of William A. Wright, Comptroller General, vs. Central of Georgia Railway Company, now on appeal in this Court.

The leases therein involved are of a wholly different nature, to-wit, leases of two railroads with perpetual charters for the entire existence of such charters that is in perpetuo.

Those leases do not contemplate or provide for any termination except by forfeiture.

That case comes here in direct appeal from the District Court as involving Federal questions. The jurisdiction below depends on the existence of such question being a case between citizens of the same State.

The lease in this case ends in 1980 without any provision for renewal.

The jurisdiction in the case here presented depends wholly on diverse citizenship. It so depended in the Court below. The fact that a writ of certiorari is sought, instead of an appeal being taken marks this difference.

The case already here may well be decided one way and this case another way.

7th. Respondents also show that the writ of certiorari as prayed for should not be ordered to issue for that in said cause not only did said petitioner Wright appeal, but these Respondents filed their Cross Appeal, assigning

errors on so much of said decree as held them liable on that part of said assessment which assessed against them certain of said property as "Atlanta Joint Terminals"; and Respondents respectfully pray that said Writ of Certiorari should not issue to bring up only Petitioners' Appeal for review; but, if ordered to issue, should bring up said entire record including Respondents' Cross Appeal and the Judgment rendered thereon.

In support of this response why such Writ of Certiorari should not issue, Respondent submits this:

"Brief in Opposition to Petition for Writ of Certiorari."

This case originated in a bill in equity filed by Respondents, citizens of other States, against William A. Wright, Comptroller General of Georgia, a citizen of Georgia, alleging that said Georgia Railroad and Banking Company (hereinafter styled Georgia Company) was chartered by an Act of the Georgia Legislature approved December 21st, 1833, with several amendments enacted prior to January 1st, 1863, with authority to build a road from Augusta, Georgia, to Atlanta, Georgia, and a branch to Athens, Georgia. (Transcript, p. 2.)

Under an amendment approved January 21st, 1852, said Georgia Company acquired a branch railroad eighteen miles long, extending from Barnett on its main line to Washington, Georgia. (Transcript, p. 2.)

In 1879, by Legislative authority, it acquired the Macon and Augusta Railroad seventy-eight miles long, extending from Warrenton, Georgia, to Macon, Georgia.

property, the title to which was in said Georgia Company; that the State of Georgia had no legal right to demand either the return, or payment, of taxes from the Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, as Lesees, of said Georgia Company. They had been informed of the return made by the Georgia Company. (Transcript, pp. 3, 4.)

The Comptroller General, on July 26th, 1910, assessed to these complainants, as the parties operating under lease from said Georgia Company, the Railroad known as the Georgia Railroad, with the appurtenances and franchises thereof and all property connected with or used in the operation of said Railroad, under the following divisions:

The Railroad from Barnett to Washington.

The Railroad from Union Point to Athens.

The Railroad from Augusta to Atlanta (exclusive of Terminals).

Rolling stock and other property used in connection therewith, including stocks and bonds leased.

Tracks and buildings and other property known as Atlanta Terminals.

Tracks, buildings and other property known as Augusta Terminals.

A copy of said assessment is Exhibit B of said Bill. (Transcript, pp. 4, 18, 19.)

Complainants deny that they have any such right, title

or interest in the property assessed as makes them liable for the taxes thereon. They aver that the property belongs solely to the Georgia Company, which has never parted with its right, title or estate therein, and which alone is liable for taxes thereon. Complainants are merely tenants for a term of years, which may in certain contingencies, expressly provided in the lease, terminate at any time prior to the end of the term named. (Transcript, p. 5.)

The Georgia Company has always recognized its obligation to pay the taxes on the railroads and property rented to complainants and during the twenty-nine years of the lease prior to 1910 the State has recognized this status and collected said taxes from said Georgia Company, and the defendant has accepted for this year 1910 (for which he now demands that said lessees make the return of said railroads, etc.), and has received, the return of the Macon and Augusta Railroad from said Georgia Company and will in due time collect the tax on said Macon and Augusta Railroad from said Georgia Company. (Transcript, pp. 5 and 6.)

It is averred that this property is not exempt from taxation, but is taxable under the charter provision by a tax of one-half of one per cent on its net earnings. That this was not a personal privilege; but a scheme of taxation inhering in this particular property and annexed to it.

But this property has remained, and still is, the prop-

erty of the Georgia Company alone, and it is alone liable for its taxes. (Transcript, pp. 6. 7.)

There is no law in Georgia for passing over the owner of property and taxing his renter.

Taxes on property are never charged to renters, tenants or lessees in Georgia, and if complainants are now taxed, as defendant is attempting, they will be denied the equal protection of the laws, and their property will be taken without due process of law, all in violation of the Fourteenth Amendment of the Constitution of the United States. (Transcript, p. 8.)

They pray:

First: That Complainants be held not liable for any of the taxes assessed by Exhibit B.

Second: That Defendant be enjoined from further charging complainants therewith, or issuing any execution therefor.

Third: For general relief and for subpoena directed to defendant Wright. (Transcript, p. 9.)

Said Wright answered said bill substantially admitting its averments, but alleging that the Lease Exhibit A created more than an unsufruct in the Lessee; that the Georgia Company thereby had created an estate in realty in said lessees differing from a tenancy, and that it has retained to itself a mere estate in reversion. (Transcript, p. 22.)

He did not intend collecting taxes on the Macon and Augusta Railroad from both the Georgia Company and the lessees. As there is no dispute as to the taxability of that railroad ad valorem, it is immaterial to the State who pays such taxes. (Transcript, p. 23.)

That the partial tax exemption in the charter of the Georgia Company was personal to that Company alone, regulating the taxation of its railroads only to the extent that they represented the investments of its stock, and while possessed and operated by that Company, did not regulate the taxation of said property in hands of other persons, and that the lessees are in effect the owners of the estate in possession and are liable for full, ad valorem taxes on said railroads; that the parties to the lease recognized that the lessees are liable to pay taxes on the property leased, and contracted therefor; that the lessees should be treated as the owners for the purpose of taxation, and should pay ad valorem taxes as any other owner. (Transcript, pp. 20-25.)

He further set up that the railroads sought to be taxed should be classified as follows:

(a) The original railroad, property and franchises of the Georgia Company in the condition in which the same were delivered to the lessees in 1881.

(b) The additions and betterments and improvements of said property made by the lessees since said lease.

(c) The Augusta Terminals constructed principally by the lessees.

(d) The Atlanta Terminals constructed principally by the lessees and used by them in connection with said railroads and also in connection with other railroads, and for other purposes.

(e) Rolling stock purchased by the lessees with their funds, greatly in excess of that received from the Georgia Company.

(a) As to Class (a), he alleged that the Georgia Company prior to the lease raised Two Million Five Hundred Thousand ($2,500,000.00) Dollars from bonds which are invested in its railroad property; that its special form of taxation does not cover this investment and that it is taxable ad valorem thereon.

That as to its railroads representing its stock, the lessees are vested with an estate for ninety-nine years, of greater value than the reversion, and are in possession; and they are taxable ad valorem on the entire value of the entire fee; but in any event on the value of said leasehold estate. (Transcript, pp. 26, 27.)

(b) As to Class (b), he averred that at the time of said lease the railroads leased were poorly equipped, laid with light iron rail, unballasted, with insufficient depots and terminals.

That the main tracks have been laid with steel rail of nearly double weight, the track ballasted, and four steel bridges replace wooden ones. The funds of the lessees have made these improvements for the benefit of the leasehold estate. No increased rental is paid the Georgia Company because of these improvements. If they

remain at the end of the lease the Georgia Company must pay for them.

These increased values amount to Four Million ($4,000,000.00) Dollars, and taxes thereon should be paid by the lessees. (Transcript, pp. 27, 28.)

(c) As to Class (c), he averred that the lessees have purchased, since the lease, lands, additional to those leased; have laid out on them, and the leased lands, extensive track yards and built thereon many tracks; also a freight depot and an office building. The entire value of these additions and improvements are Three Hundred and Twenty-five Thousand ($325,000.00) Dollars. This investment represents funds of the lessees and not stock of the Georgia Company. No additional rent is paid because of these improvements; the lessees get the benefit thereof; the Georgia Company must pay for them at the end of the lease.

He insists they are taxable ad valorem to the lessees. (Transcript, p. 28.)

(d) As to Class (d), he averred that the lessees have erected partly on land leased from the Georgia Company, and partly on land acquired by said lessees, from two other Railroad Companies (hereinafter called West Point Company and the Louisville Company) what are called the Atlanta Joint Terminals, to-wit: a system of tracks and other terminal facilities, used jointly by said lessees, and said other Companies, who pay interest on the in-

vestment, taxes and expenses of all sorts pro rata according to use. Funds of the Louisville Company aggregating about Two Million Dollars ($2,000,000.00) were expended in creating the same. (Transcript, pp. 28, 29, 42, 43, 44, 45.)

They are managed by said parties, jointly through a Board of Control, composed of their respective general managers, and "are to all intents and purposes a separate partnership enterprise."

Some of the space in buildings is rented out to merchants for purposes of trade. (Transcript pp. 44, 45.)

He insists said lessees are liable for the taxes assessed by him on the Atlanta Joint Terminals. (Transcript. pp. 28, 29, 42, 46.)

Said Wright also averred that the lessees in 1882 extended the Athens branch from its then terminus, east of the Oconee River, one mile, into the City of Athens, and acquired the necessary lands and built the necessary terminals therefor at a cost of Three Hundred Thousand ($300,000.00) Dollars. The title was taken in the name of the Georgia Company, but the funds were furnished by the lessees. Such extension and property represent taxable funds of the lessees and they are taxable thereon. (Transcript, pp. 46, 47.)

(e) As to Class (e), he averred that the lessees have bought rolling stock with their own funds which is not an investment of the "stock" of the Georgia Company

and on which lessees should pay taxes. (Transcript, pp. 29, 30.)

A statement of facts was agreed upon by the parties. (Transcript, pp. 64-81.)

It shows that the proceeds of said Two Million Five Hundred Thousand ($2,500,000.00) Dollars of Bonds, (Amended Answer (a),) went to the extent of Six Hundred and Forty-Nine Thousand, Eight Hundred and Thirty-Seven and 34/100 ($649,837.34) Dollars into the Port Royal and Augusta Railroad, and were a total loss. (Transcript, pp. 65, 66.)

Seven Hundred and Eghty-Eight Thousand, Nine Hundred and Forty and 12/100 ($788,940.12) Dollars now exist in fifteen thousand (15,000) shares of capital stock of Western Railway of Alabama. (Transcript, pp. 65, 66.)

The Macon and Augusta Railroad absorbed Nine Hundred and Ninety-Four Thousand Three Hundred and Seven and 6/100 ($994,307.06) Dollars. (Transcript, pp. 65, 66.)

These three sums aggregate $2,433,085.22

The Macon and Augusta Railroad is not included in the Comptroller's assessment, and his answer admits the State has collected her full claim of taxes as to it. (Transcript, pp. 22, 23, paragraphs 12 and 16.)

It is evident that the defendant has not proven his affirmative allegation that the proceeds of these Two Mil-

lion, Five Hundred Thousand ($2,500,000.00) Dollars of bonds went into the railroads and equipment of the Georgia Company.

For a detailed history of these bonds and their issuance, see (Transcript, pp. 74-76).

The agreed statement of facts shows the expenditures made on the road. (Transcript, pp. 66-70.)

Excluding the cost of the Washington Branch and the Macon and Augusta Railroad, on both of which ad valorem taxes are paid, there has been spent since 1853, the time when the Railroad was completed, up to the lease, twenty-eight years, about Four Million, Two Hundred Thousand ($4,200,000.00) Dollars, derived almost entirely from earnings. This is about One Hundred and Fifty Thousand ($150,000.00) Dollars per annum and includes expenditures for rolling stock. (Transcript, pp. 66, 68.)

Since the lease, thirty years, the lessees have expended for keeping up the leased property out of the net income of such property Four Million, Six Hundred and Thirty-Three Thousand, Five Hundred and Twelve and 77/100 ($4,633,512.77) Dollars. This is One Hundred Fifty-Four Thousand, Four Hundred and Fifty and 42/100 ($154.-450.42) Dollars per annum on three hundred and eight miles of road, or about Five Hundred ($500.00) Dollars per mile. (Transcript, p. 69.)

The title to all of this property involved, except a part of the Atlanta Terminals, is in the Georgia Company. (Transcript, p. 69.)

All of the expenditures except this last, are within the territorial and topographical limits prescribed by the Georgia Company's charter, and have been made for the conservation and improvement of its roads. (Transcript, p. 70.)

The rolling stock on hand at the date of lease aggregated eight hundred and sixty-five (865) cars of all sorts. The locomotives, forty (40).

The rolling stock on hand now (September 7th, 1911) aggregates nineteen hundred and eighty-three (1983) cars and eighty-three (83) locomotives. The title to these engines and cars, lessees insist is in the Georgia Company. Defendant contends to the contrary.

These additions to rolling stock have been made by the lessees in good faith in the belief that they were rendered necessary by the increased business of the leased roads.

This business has increased from Tons of Freight carried, Three Hundred and Forty-Four Thousand, Five Hundred and Seventy-Nine (344,579),—and Ton Mileage, Forty-Five Million, Seven Hundred and Five Thousand and Seventy-Four (45,705,074), in year ending March 31st, 1882, to Tons of Freight Carried, One Million, Eight Hundred and Forty-Three Thousand, Two Hundred and Twenty-Two, (1,843,222), and Ton Mileage, Two Hundred and Seven Million, Nine Hundred and Forty-Three Thousand, Three Hundred and Thirty-Seven (207,943,337), in year ending June 30th, 1911,—and from Passen-

gers carried in said year ending March 31st, 1882, Two Hundred and Ninety-Seven Thousand and Twenty-Two (297,022),—Passenger Mileage, Twelve Million, Five Hundred and Ninety-One Thousand, Three Hundred and Three (12,591,303),—to Passengers for year ending June 30th, 1911, One Million, Two Hundred and Seventy-Eight Thousand, Nine Hundred and Thirty-Four (1,278,934), Passenger Mileage Forty-One Million, One Hundred and Sixty-Eight Thousand, and Ninety-One (41,168,091). Other railroads in Georgia have made proportionate increases in like facilities. (Transcript, pp. 70, 73, 78, 81.)

Since the lease the Georgia Company has returned annually the net earnings of its chartered property, not the rental, for taxation and has paid to the State one-half of one per cent on such net earnings. In some years the earnings have exceeded the rental, in others, they have been less.

The Georgia Company has paid taxes to the defendant to date on the assessments of the Macon and Augusta Railroad and Washington Branch, but the taxes of 1910 were paid under stipulation, that the receipt of the taxes by defendant from the Georgia Company was not to estop him from claiming that these taxes were legally due from said lessees. (Transcript, pp. 73, 74.)

For a tabulated statement of the net income and taxes paid thereon from 1881 to 1911, inclusive, see (Transcript, pp. 80, 81).

The case came on to be finally heard on the pleadings and agreed statement of facts.

The Court rendered an opinion in which it was held that under the law of Georgia the Lease Contract created an usufruct and not an estate for years.

That the lessor, the Georgia Company, and not the lessee, was liable to the State for all taxes on the property rented and its accretions and accessions, and that as to such, except the Macon and Augusta Railroad and Washington Branch, the tax of one-half of one per cent. on the net income was the measure of taxation. That all property involved in the suit was such rented property, or accretions and accessions, except the Atlanta Joint Terminals. That as to that, a part might be a mere betterment of the old property and not subject to ad valorem taxation against the lessees, but what that might be the Court could not at the time determine from the facts before him. (Transcript, pp. 82, 95.)

A final decree was taken perpetually enjoining the enforcement of the defendant's assessment, except as to the Atlanta Joint Terminals. As to the assessment of, and collections of taxes thereunder on these, the injunction was denied. (Transcript, pp. 95, 96.)

The defendant Wright presented his petition for appeal from all parts of the decree except that relating to the Atlanta Terminals. (Transcript, pp. 96, 97.)

These respondents took a cross appeal from so much of said final decree as held that said Atlanta Joint Terminals were subject to be taxed under the assessment sought to be enjoined in this case, and which denied the

injunction restraining the defendant from proceeding to collect the taxes thereon, levied under said assessment. (Transcript, pp. 101, 110.)

A.

I.

The Questions in the Case on the Petitioners' Appeal.

The main question in this case is not whether there is property outside of the special scheme of taxation of the Georgia Railroad and Banking Company's Charter, or whether the Complainants themselves have **special interests** liable to be taxed; but whether **the complainants, and not the Georgia Railroad and Banking Company** are liable for the taxes due on the property, the **fee simple** title to which in law and equity, is in the Georgia Railroad and Banking Company; or must the Comptroller General let that Company return its property and adjust the taxes thereon with it under the law applicable thereto.

In subordination to this main question we insist:

1st. That under the Common Law, a landlord, or the owner of the fee, where there is an estate for years, pays the taxes **on the entire property and interests therein.**

2nd. That where this law has not been changed, to tax the owner on the full assessment, and tax the lessee on his interest, which is included therein, or **vice versa,** is double taxation and illegal.

3rd. That it is only by express statute that a lessee is taxed upon his leasehold interest as a separate thing, and, in that event, the owner only pays on the value remaining after deducting the lessee's assessment.

4th. That there is no law in Georgia for so dividing an estate, where the right claimed by each party extends to the **whole** property, and is only a succession of terms of enjoyment. That in such case **one** or **the other,** pays the whole tax, e. g., a life tenant, who pays **all** taxes; or the holder of a bond for title (these estates are, either in law or equity, **free-hold** estates); or in case of a lease, the owner of the fee. (Here the lessor's estate is the free-hold, and the lessee's a chattel real.)

Respondent concedes this to be true in the case of an usufruct tenancy, however valuable, and this confession destroys his argument, that every **interest** of pecuniary value is taxed **to the holder thereof.**

5th. That the Statutes of Georgia recognize this method of taxation in such cases.

6th. That it is only where interests have been divided, so that partial ownership by one and his assigns is exclusive of the subject matter owned, for **all** time, and really divides the elements of value in the property, as where one owns the mineral interest and another the agricultural, each being divested of all interest in that element owned by the other, that each pay taxes.

7th. That in the present case this lease is an usufruct.

8th. That if the **law** did not attach the burden of taxes and repairs on the landlord it would have been useless to contract, as here done, for the payment thereof by the tenant in part.

9th. That such covenants create no obligation to, or right in, the State, nor can the State proceed against the party so contracting, by its assessment and summary process.

That it is merely a part of the rent so to be applied, and pays the landlord's debt.

10th. That even if this lease created an estate for years, as opposed to an usufruct, it would still leave the landlord liable for the entire taxes due on the property.

11th. That this method of taxation does not exempt any property. It is a mere method of collecting the taxes due on the property by requiring that the person who stands in a certain relation to it shall owe and pay what is due from the **entire** interest therein.

Thus the life tenant pays the taxes on the life estate, and on the remainder or reversion; also he receives the entire issues and profits of the estate. So too the party in possession under a bond for title. But a lessor is receiving the **rents** of his estate and is bound for its taxes. He has the ability, through fixing the amount of rent in gross, or by making the lessee pay as additional rent a sum equal expressly to the taxes, to reimburse himself.

12th. That the property added to the Georgia Rail-

road and to which, under the lease, the lessor takes title, is protected by its charter scheme of taxation.

13th. That this scheme is not a provision how the Georgia Railroad & Banking Company should be taxed, but how **the property** intended to be described by Section Fifteen of its Charter is to be taxed.

14th. That this embraces all accretions necessary to meet increasing business and improved maintenance required to keep pace with its present duty to the public.

15th. That the agreed statement of facts shows that no betterment, the title to which has gone into the Georgia Railroad and Banking Company, exceeds its present needs and duties under its increased business.

16th. There is no suggestion that the extensions at Augusta or Athens, or improvements of track or rolling stock are not now needed.

17th. The joint arrangement at Atlanta is in harmony with the State Law permitting roads to use terminals jointly, and increases the efficiency of the Georgia Railroad and Banking Company in transacting business with the public.

18th. The properties outside of those owned by the Georgia Railroad and Banking Company are conveyed to these complainants, **not** under the lease, but under a separate tripartite agreement. It vests them with these properties only for a limited time. Makes them mere agents of the real owners, not more than lessees, and

leaves all property, not owned by the Georgia Railroad and Banking Company, taxable to the party who contributed it, i. e., to the Atlanta & West Point Railroad Company **as owner** in respect to the property it brings in, and to the Louisville & Nashville Railroad Company, **as owner,** in respect to the property it brings in.

None of it is taxable to these complainants as lessees of the Georgia Railroad & Banking Company, or to them jointly in any capacity.

II.

The assessment of the Comptroller was intended to tax only the property appurtenant to the Georgia Railroad and held by the Complainants as lessees.

The Assessment of the Comptroller General.

The bill avers and the answer concedes:

1st. That the Georgia Railroad and Banking Company from the year 1881 has been returning this property for taxation and has been paying the taxes required by Section Fifteen of the Charter thereon.

We do not claim that the Comptroller's action estops the State; but we do insist that the action of the Executive Department, persisted in for years, and despite resistance, is persuasive evidence of the meaning of the law.

Since this lease every department of the State Government, until now, has treated the Georgia Railroad and Banking Company as the proper and sole tax payer.

This is persuasive evidence of the law to a Court first declaring it.

Temple Church vs. Terminal Co., 128 Ga., 669, 680.

2nd. That in 1910 it tendered the same return, and the Comptroller General rejected such return, on the ground, not of incorrectness, but because he demanded that the lessees, instead of the Georgia Railroad and Banking Company, should return what the lessor had been returning.

3rd. The defendant did not demand, on the present occasion, that the lessees should return any interest or property, different from that offered by the lessor; but asserted that the **lessees** and **not the lessor** was the debtor-tax payer, and made an assessment to reach this property and every interest therein, against the lessees.

4th. The assessment shows that it proposes to tax the entire value and interest against the lessees. It states:

Whereas Complainants are jointly operating the Railroads known as the Georgia Railroad.

(The Bill states and the answer admits, Respondent knew they held and were operating as lessees under Exhibit "A.")

Whereas they have failed to make a return of their property (meaning as shown and admitted, not their **other** railroads or property, but—said Georgia Railroad).

Whereas respondent demanded a return "of said Rail-

roads with the appurtenances and franchises thereof and of all property connected with, or used in the operation of said Railroads."

"Whereas complainants have failed and refused to make such return."

Now, therefore, I assess "the above mentioned properties, as follows:

Railroads from Barnett to Washington.

Railroads from Augusta to Atlanta (exclusive of Terminals).

Railroads from Union Point to Athens.

Rolling stock and other property used in connection therewith, including the stocks and bonds leased.

Tracks and other property known as:

Atlanta Terminals.

Augusta Terminals. (Transcript, pp. 18, 19.)

It is, therefore, perfectly evident that the Comptroller General was not endeavoring to tax property, the title to which he claimed was **not** in the Georgia Railroad and Banking Company; but to insist that by the lease the **property of** that Company had been so transferred to the lessees that they, and they alone, were liable to pay all taxes to be assessed against it, that they must pay all such taxes on an ad valorem assessment, and that the taxing scheme of the 15th Section of the Charter of the Lessor was now inoperative as to the property.

III.

The Lease of the Georgia Railroad and Banking Company to W. M. Wadley created an usufruct, and not an estate, in the lessee.

An examination and analysis of this lease shows that its operation and effect are as follows:

By it the Georgia Railroad and Banking Company "rents and farms out" to Wadley and assigns (heirs are not mentioned), for the term of ninety-nine years, without any provision for renewal:

"Its privileges, general and exclusive of transporting persons, merchandise, products, and every kind of property;" and "as the means of full enjoyment of the privileges hereinbefore rented and farmed out, the following property, to-wit": (describing certain Railroads and personalty).

It **assigns** to Wadley and assigns its claim on the Walton Railroad for certain purposes; also its right of ownership, management, control and use of the Western Railroad of Alabama.

It agrees to **assign** and **transfer** the income on certain Atlanta & West Point Railroad Company stock, and to give an irrevocable proxy to vote the same.

Also the income of the stock and bonds of the Port Royal and Augusta Railroad Company, with like proxy.

It agrees to **deliver** to the Second Party and assigns all steel rails then on hand. (Transcript, pp. 10, 17.)

No words of **grant** are contained therein; no estate is granted therein; what is rented is "Control, use or enjoyment."

It is insisted that the use of the word "Lease" determines the nature of the instrument and creates **an estate,** as distinguished from **an usufruct.** This is an error. The word is used indiscriminately as to instruments creating each kind of interest.

Code of Georgia of 1910, Sections 3690, 3691.

It was insisted in the Court below that a tenant does not "possess" the property under an usufruct, that the landlord is in possession. The Code of Georgia defines an usufruct as "the right to possess and enjoy the use."

Code of 1910, Section 3691.

Such a tenant has "possession" and the "right of possession."

Code of 1910, Sections 3694-6-7-8.

Had this been an estate for years the tenant must have repaired at his own expense, without any contract so to do.

Code of 1910, Section 3689.

This duty the lease calls, **by contract,** on the tenant to discharge, which is an unnecessary provision if the in-

strument created an estate for years, as opposed to an usufruct for a like period.

It was necessary to relieve the landlord if an usufruct.

Code of 1910, Section 3699.

It was a terminable thing and contemplated the return to the landlord, at the end of a term, and not merely by default, and a settlement then between Landlord and Tenant. It had no provision for any renewal after the year 1980.

It provided for betterments; "additions and substitutions" to "**be**" at once the property of the lessor, but deferred payment therefor by the lessor until the end of the term. That such additions become at once the lessor's property. See:

Bass vs. Metropolitan, etc., R. R. Co., 82 Fed. 857;
People vs. Baker, 47 N. E., 46.

While there is no case in Georgia of a lease exactly like this one, and no case holding that the lessee must pay taxes (except the perpetual ground-rent leases mentioned hereafter), we think there are cases which hold a lease, practically identical, creates only an usufruct.

The cases construing Railroad leases are:

Central Railroad and Banking Company vs. Macon, where the Central Railroad and Banking Company took a perpetual lease from the Macon and Western Railroad

Company of its entire properties and franchises for the term of its charter life (which was perpetual), with a provision for actual merger so soon as legislative authority therefor was obtained.

The lease was attacked because it was claimed to be a merger and not a lease, and because the Corporation had no charter power to lease. The question as to the character of the lease, if it was a lease, was not discussed.

The merger provision was held separable and inoperative, without the further legislation contemplated, and its legality not to be considered until such time. As a lease it was held **infra vires.**

The instrument spoke of the "term hereby granted." It covenanted for further "conveyances" if required, and was an entirely different instrument from the lease now in question.

Yet the Court did not, in any way, pass on its character, as creating an estate, or an usufruct, and the decision is without significance on that point.

Central R. R. & Banking Co. vs. Macon, 43 Ga., 605.

The next case arose under the lease of the Augusta Southern Railroad to the South Carolina and Georgia Railroad Company. The nature of the instrument was wholly different from that now under consideration. It was perpetual and "granted" the property to the second party, its successors and assigns, "To have and to hold" for the corporate life of the first party and all extensions

or renewals thereof. The question raised, however, was **solely** whether it created a relation of lessor and lessee, or of partners, between the parties thereto, and the Court held it created the relationship of lessor and lessee, not of partners.

The question whether it created an estate for years as opposed to an usufruct was not raised or decided.

South Carolina Co. vs. Augusta Co., 107 Ga., 164.

The Appellant says the case is valuable because it holds that when "the lessee (was) put in possession, the lessee became the absolute owner of the property for the term of the lease."

This was said in reply to the claim that the party termed lessor was really a partner and as such in joint possession. It did not deal with the nature of the interest, except whether joint or sole.

But this language could well be used in every sense as to that instrument which eliminated the lessor for all time.

Again in speaking of tenants who had no estate in the land, but only an usufruct, the Supreme Court of Georgia says:

> "A tenant, although he has no estate in the land, is the owner of its use for the term of his rent contract and can recover damages for any injury to such use occasioned by the erection or maintenance of a public nuisance," etc.

Bentley vs. Atlanta, 92 Ga., 623;
Pause vs. Atlanta, 98 Ga., 92, 97.

This sort of an interest is also termed a "leasehold interest."

Pause vs. Atlanta, 98 Ga., 92, 97.

The third case on this subject is that of Southern Railway Company vs. State of Georgia. There the State as the owner of the Western and Atlantic Railroad sued the Southern Railway Company for an alleged trespass on the Western & Atlantic Railroad right-of-way. The State was held to have no case because the injury, if any, was to the right of enjoyment of the lessee of the State. the Nashville, Chattanooga & St. Louis Railway, which held under a lease for twenty-nine years executed in December, 1890.

Southern Ry. Co. vs. State, 116 Ga., 276.

It was argued by appellant in the present case that the decision that the right of action was in the lessee showed that this Railroad lease for a term of twenty-nine years created an estate in the property as opposed to an usufruct.

It is a sufficient reply to show that under the decisions just cited the tenant of an usufructuary interest can maintain such an action.

Bentley vs. Atlanta, 92 Ga., 623;
Pause vs. Atlanta, 98 Ga., 92, 97.

But in a later case the Supreme Court has held that this 29 year lease from the State to the N. C. & St. L. Ry. created an usufructuary interest only, which could not be taxed to the lessee.

State vs. W. & A. R. R. Co., 136 Ga., 619, 625.

This ruling has been repeated in a more recent case.

Western & Atlantic R. R. Co. vs. Western Union Tel. Co., 75 S. E., Rep., 471, 475.

The only other cases are the Savannah ground rent cases where the owner of the estate, subject to the ground rent, was held liable for taxes even to the City to which he owed the ground rent.

But the Court closely discriminates and limits this case. It shows that the so-called lessee is really the owner of the fee, subject to a charge reserved thereon. That there is really no reversion in the so-called lessor but only an annuity reserved, and that on default, instead of re-entry resulting, the property is sold, the charges discharged; and any surplus paid to the lessee, the purchaser taking the same estate he had, subject to a like charge for the future. That he is in fact the owner for all futurity with full power of alienation.

Wells vs. Savannah, 87 Ga., 397.

The Supreme Court of Georgia has recognized this difference. In the case above cited it says:

"The case presented is not that of a perpetual leaseholder where the tenant is the virtual owner of the prop-

erty entitled to its use forever and subject to pay taxes thereon as the owner, as was the case of Wells vs. Savannah, 87 Ga., 397."

State vs. W. & A. R. R. Co., 136 Ga., 619, 625.

This Wells case is similar to a recent case decided by the Supreme Court of the United States which cites it, and clearly draws the distinction between this perpetual estate charged with a ground rent and the estate created by a lease where a termination, however remote is contemplated. It recognizes the general rule "that the landlord is responsible for taxes," and puts the decision on the ground that the lessee is "the virtual owner" and has "rights different from those usual in a mere leasehold estate."

J. W. Perry Co. vs. Norfolk, 220 U. S., 472, 479.

IV.

In the case of an estate for years, the landlord, or owner of the fee, and not the tenant, pays all taxes.

But even if this lease created an estate for years it would not change the relations, or liabilities, of the parties thereto as to taxes.

A lease creating an estate for years does not cast on the lessee the burden of paying the taxes on the property, or render it (the entire estate) taxable as the lessee's property. The lessor is liable for the taxes.

Taylor on L. & T. (3rd Ed.), Sec. 341;

E. T. V. & G. Ry. Co. vs. Morristown, 35 S. W., 771;
12 Am. & Eng. Enc. of L. (2nd Ed.), p. 709;
Boston Molasses Co. vs. Commonwealth, 79 N. E., 827.

Where a lessee covenants to pay taxes it is a promise to pay what the lessor owes to the State and is really due to the lessor as a part of the rent.

Perrins, etc., Co. vs. Cook, 93 S. W., 337;
Elliott vs. Grant, 64 Mo. App., 248;
Aught vs. Orchard, 92 Mo. App., 466;
McManus vs. Shoe Co., 60 Mo. App., 216;
Gedge vs. Shoenberger, 83 Ky., 91-94.

It is due as rent to the lessor:

Bowditch vs. Chickering, 30 N. E., 92;
Amory vs. Melvin, 112 Mass., 83, 87;
Carnes vs. Hersey, 117 Mass., 267.

In this State there is no change at all in the common law as to the lessor of an estate for years being chargeable with the taxes.

Reliance is placed on Code of 1910, Sections 1018, 3689, to show that a tenant for years is chargeable with all the taxes.

Section 1018 declares the owner is to be charged, if known—otherwise "against the specific property." "Life tenants and those **who own** and enjoy the property are chargeable with the tax thereon." Hence as between maker and holder of a bond for title, "the one receiving the rents or enjoying the use is liable."

Section 3689 only declares "a tenant for years is bound for all repairs or other expenses necessary for the preservation and protection of the property."

This is the rule of the common law and does not include taxes.

4 Kent. Com., p. 110.

A tenant for life pays the taxes, but in a tenancy for years the landlord pays them.

Cooley on Taxation (3rd Ed.), pp. 819, 822.

Where a Bridge Company leased a bridge to a Railroad Company on long lease, but with provisions for reentry, it was held that the Bridge Company and not the Railroad Company was taxable therefor.

Glenn vs. Miss. River Bridge Co., 54 A. & E. R. R. Cases, 308, 310;
Chicago & Alton R. R. vs People, 38 N. E., 1075.

But if a tenant contract to pay taxes, that means only such taxes as the landlord is liable for, and if the landlord is exempt, or pays a special tax, such is the measure of the tenant's obligation.

People vs. Barker, 47 N. E., 46;
Bowditch vs. Chickering, 30 N. E., 42;
Underhill on Landlord and Tenant, Sections 605, 607.

The lessor here provides for enlargement pending the lease on its own account, and at its own expense, in order

to discharge its growing public duty. All property added or substituted "shall be" the property of the lessor.

Gardner vs. Ga. R. R. & Bkg. Co., 117 Ga., 522, 532.

This is especially true in a railroad lease like this.

Lessor does not cease to be operating the property.

Ga. R. R. & Bkg. Co. vs. Haas, 127 Ga., 187, 193.

It does not, like in case of a sale, cease to be the owner. It has only at most created a chattel real interest in the thing it still owns, and operates it through the lessee as its agency.

In Re. N. Y., N. H. & H. R. R. Co., 23 Am. & Eng. R. R. Cases, 43, 49;
Hutchinson vs. Hodnett, 115 Ga., 990.

In some leases additions remain the lessee's property and taxable as such to the lessee. This is only where the lessee can remove the same at the expiration of the lease. Here they become instantly the lessor's property.

Bass vs. R. R. Co., 82 Fed., 857;
People vs. Barker, 47 N. E., 46.

V.

The Charter provides a method of taxation of this property, certainly until it has ceased to belong to the Georgia Company.

This Section Fifteen of the Charter of the Georgia Company is not an **exemption** from taxation; but is a

method of taxation affixed to the plant of the Railroad Company and contracted for by said charter.

Wright, Comptroller, vs. Ga. R. R. & Bkg. Co., 216 U. S., 420, 425, 430, 432;

McHenry vs. Alford, 168 U. S., 651, 661;

Travelers Co. vs. St. Paul & C. R. Co., 76 N. W., 217;

Columbia W. P. Co. vs. Campbell, 54 S. E., 833, 837;

Boston Molasses Co. vs. Commonwealth, 79 N. E., 827.

In the case of the 168 U. S., 651, if the "method" was an exemption it would have been void under the State Constitution. The Supreme Court reversed the State Court, deciding that this method of taxation was not an exemption.

The provision of the Georgia Railroad charter prescribing this "method of taxation" is wholly unlike these charters which either say "the said Company is hereby relieved from paying taxes except one-half of one per cent," etc. (There a clear personal right is given.)

Or those other charters of which an example occurs in another Minnesota case reported in 119 N. W., 202, where it was provided that the Company at its option might pay a certain per cent of earnings and if it did, then it should not be taxed. There a mere personal option was extended, which it need not exercise and which depended on its personal choice for exercise.

Here it is prescribed that the property, railroads and franchises, shall bear a certain tax as an exclusive substitute of other taxing methods.

Here also the original railroad company still owns the railroad. Nothing has occurred to relieve it of liability to the State to pay taxes thereon as provided by the charter.

Had this Railroad and franchises been sold out by judicial sale as in the cases cited by defendant, the Georgia Railroad and Banking Company would no longer owe any tax or own any interest in this Railroad and its franchises. Here it continues the owner and annually enjoys its ownership through the receipt of rent, and the betterment and keeping up of its railroads for use by it when the lease ends within a time that many persons now alive will live to see.

VI.

Accretions and accessions proportioned to and suited to the increasing business of a carrier are a part of its legitimate railroads and plant and subject to like taxation as its original road.

Such betterments are part of its Railroad and covered by the charter method of taxation, which is exclusive.

Wright vs. Ga. R. R. & Bkg. Co., 216 U. S., 420.

Suppose the Georgia Company had not leased and had so enlarged its plant?

What difference if it engages a lessee to act for it and at its expense?

No one would claim it could not legitimately make provision in heavier and safer tracks, larger and more cars and motive power, to properly discharge its public duties as the growth of the Country and its commerce required.

The growth of its business is due to its location, not to any artificial manipulation.

The agreed statement of facts shows that geographically it lies between the Railroads of the Atlantic Coast Line on the East and those of the Louisville and Nashville Railroad Company, on the West. It furnishes the highway of commerce, connecting the two systems. That it would do if it were not leased at all.

With close and friendly traffic relations it would handle the same traffic it now handles, if it were not under lease.

The growth of its equipment and motive power, and terminal and other facilities, is not disproportioned in any way to the growth of business shown.

No proof is offered to sustain a contrary charge.

The agreed statement of facts shows that its betterment and increase have been proportioned to its business, and moderate. See the tables in the Statement. (Transcript, pp. 66, 67, 68, 69, 72, 78, 79, 80.)

The expenditures for roadway structures and rolling stock equipment are not more than $500.00 per mile per annum and about the same per mile per annum as before the lease. (Transcript, pp. 66-69.)

For exact figures see the statement of the case in this brief.

When this property was created the State prescribed a special mode of taxation therefor.

Substituting the definition of the opinion in Wright vs. Railroad Company, 216 U. S., 420, for the words "the stock of said Company;" the State contracted for all time that "the Railroad" with "improvements made from time to time" which "the necessities of an enlarging business and the improved maintenance naturally demanded" embracing "all property necessarily held and used to make that income, including the enjoyment of its franchises, upon which net income the scheme of txation rests * * * * shall be subject to a tax not exceeding one-half of one per cent per annum on the net proceeds of their investments."

Wright, Comptroller, vs. Ga. R. R. & Bkg. Co., 216 U. S., 420, 425, 430, 432.

This method of taxation covers the entire investment made in the Railroad and property appurtenant thereto in however high a state of development that entity thus created and endowed with franchises by the Act of 1833, may be.

City of Augusta vs. Ga. R. R. & Bkg. Co., 26 Ga., 651, 662.

The defendant admits that if the corporation invested Ten Million Dollars of money derived from earnings in creating a Railroad with rock ballast, steel bridges, heavy rails, providing terminals and depots required by the growth of the country and traffic it served, this would be legitimate. He must admit that the State contemplated it would do these things and that its duty to the State under its charter required it to do these things. The charter contemplated an enlarging plant and authorized it.

Gardner vs. Ga. R. R. & Bkg. Co., 117 Ga., 522, 532.

We insist that if it borrows money either directly on bonds or notes and does these things itself, or from the lessees by the lease contract under which it must at the end of the lease pay, and causes these things to be done for it by the lessees, it is none the less an investment of the Company in and on its stock, which it must pay for ultimately from earnings; that it is a part of the fund which produces the income from which it pays the one-half of one per cent required by the charter; that it is an accretion in the strictest sense, indeed a growth of the very trunk of the tree of the system; that the railroad and appurtenances are the same, and no other, entity, whether the condition of the road and its terminals be in efficiency like the Pennsylvania Railroad of today, or like the stringer tracks and link and pin equipment of 1840.

> "A tax upon earnings is a tax which at last covers "and includes, unless double taxation be intended "all property necessarily held and used to make that "income, including the enjoyment of the franchises."

Wright, Comptroller, vs. Ga. R. R. & Bkg. Co., 216 U. S., 420.

VII.

The charter method of taxation is not confined to the investment of the original Four Million Dollars of Stock.

The proposition that the Charter method of taxation applies alone to such undivided part of the Railroad and appurtenant property lawfully owned and used by the Georgia Railroad and Banking Company, by itself or lessees, legitimately embraced in its franchise and charter enterprise, as represents the original four million dollars of stock, and that any additional, though equally proper part, is to be taxed **ad valorem**, is wholly unsound and is in antagonism to the essential idea both of the necessary unity of a railroad and the **duties** of betterment owed to the public under its franchises.

In the first place, even if the position is sound, this assessment of the Comptroller is void; he has no right to assess the entire road and appurtenances, because there may be **some values** in it which he can tax.

Again, if such an anomalous railroad can exist, that is taxable as to certain indivisible parts on income, and on other indivisible parts, **ad valorem**, the Comptroller has no power conferred on him to tax that kind of a railroad. The Act from which **alone** he derives power does not apply to such a railroad. He is as **impotent** as to it as he used to be in the matter of levying County or Municipal taxes.

He must show authority, for his present authority is a statutory exotic and not any inherent growth.

But in Georgia every part of a Railroad and its franchises, is one and indivisible.

City of Atlanta vs. Grant, Alexander & Co., 57 Ga., 340.

Farmers Loan & T. Co. vs. Candler, 87 Ga., 241.

VIII.

That a part of the leased property or its additions is taxable ad valorem does not render the Complainant liable to be taxed therefor.

But even if the Georgia Railroad and Banking Company now owns Railroads and property not covered by the taxing scheme of Section Fifteen of its Charter—if the extension into Athens, or Augusta Terminals, or added values anywhere exist, upon which **ad valorem** taxes are due, the complainants are not liable to the State for taxes thereupon, or to an assessment.

The Georgia Railroad and Banking Company is such tax payer, just as it is for the Macon and Augusta Branch or the Washington Branch, both of which are additions not covered by said Section Fifteen.

Instead of refusing to let the Georgia Railroad and Banking Company make a tax return the Comptroller should have called on it to amend its return. This Company could have resisted an undue demand. It could

have had an arbitration if it desired. To say that the Georgia Railroad and Banking Company has additional property subject to **ad valorem** taxation is no reply to the insistence of these complainants that they do not owe to the State the duty of a return, or the payment of taxes thereon.

So, while we insist that all property, the title to which is in the Georgia Railroad & Banking Company, is cov ered by its Charter scheme of taxation and that the taxes thereon have been paid in the payment of one-half of one per cent on the net income; yet if it be held otherwise, these Complainants are no more liable to the State for **ad valorem** taxes thereon than they are liable **to the State** for the **ad valorem** taxes of the Georgia Railroad and Banking Company on the Washington Branch or the Macon and Augusta Railroad.

Now, it is manifest that every accretion, addition or substitution to the property of the Georgia Railroad and Banking Company, (except certain terminals in Atlanta, claimed by the respondent to be otherwise held) are owned **now** by the Georgia Railroad and Banking Company as completely, as it owns its main tracks. These are:

The one mile of track in Athens and Athens Terminals.

This is not assessed separately and no value is placed thereon or claimed therefor in defendant's assessment. (Transcript, pp. 10, 19.)

The Augusta Terminals.

All improvements erected on its property in Atlanta and all rolling stock and equipment.

Hence they are the lessor's property, and the lessor is the State's tax payer and not the lessees.

IX.

The Complainants are not liable to be taxed on their leasehold interest as a separate property under the law of Georgia.

But defendant urges that these complainants as lessees own a leasehold estate of large value, for which they should have made a return instead of the Georgia Railroad and Banking Company.

This case is not whether the State can by summary process collect taxes from a recalcitrant tax payer; but, whether the State can advise the Georgia Railroad and Banking Company that it will not treat with it at all as a tax payer and will tax the Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company on the property of the Georgia Railroad and Banking Company, instead of taxing that Company at all.

But even if that were not so, we deny that there is any interest in this property taxable under the law of Georgia to these complainants as lessees of the Georgia Railroad.

The Code sections bearing on this subject are as follows:

"All persons owning any mineral or timber interests, or any other interest or claim in or to land less than the fee shall return the same for taxation and pay taxes on the same as on other property. And any person failing to comply with the requirements of this section shall be proceeded against as a defaulting taxpayer."

Code of 1910, Section 1008.

"Taxes are to be charged against the owner of property if known, and against the specific property itself if the owner is not known. Life-tenants, and those who own and enjoy the property, are chargeable with the tax thereon. Hence, while the public may treat property as belonging either to the maker or the holder of a bond for titles, when the latter is in possession, yet as between the parties the one receiving the rents or enjoying the use is liable for the tax."

Code of 1910, Section 1018.

It will be noted that the interests to be separately returned are "mineral or timber or **other** interest," "less than the fee." This term "less than the fee" clearly does not refer to the estate in the mineral or timber, or other interest but means that an absolute fee simple title confined to mineral, timber, agricultural or other limited interest in the land, is an interest less than the fee; that is, the fee here means the aggregate of the mineral, timber and all other elements of the land value.

Code of 1910, Section 1008.

If it meant that a lessee must pay taxes separately on his interest, that would apply equally to a lessee of an estate for years or of an unsufruct only. It would make the remainderman after a life estate, or the holder of the legal title, where there was a bond for title holder in possession, also pay taxes on their respective interests.

The Section must be read in connection with Section 1018 of the same Chapter, which says, that as between such divided ownership, or interests, extending through the entire property and divided only as to successive interests in the whole, the taxes are to be paid by him who is reckoned the owner; as the life tenant or the holder of the bond for title. As we have seen, this burden rests on the lessor, and not the lessee. (See authority already cited.)

As already noted this is not the exemption of any property from taxation but is merely a requirement as to who shall pay the taxes and who is personally liable to the State therefor.

Taxation of property in the hands of one person, the owner, satisfies the State's claim for taxes thereon, and to again tax an interest in it in the hands of another person, although of value to him, is double taxation and not contemplated by the Constitution of Georgia.

> "3. A tax law will not be so construed as to re-
> "quire the same property to be taxed a second time,
> "unless such a construction is required by the ex-
> "press terms of the statute or by necessary implica-
> "tion.

"4. When a tax is imposed upon that which has "inherent value in the hands of one person, and is "also imposed upon that which is a mere symbol "thereof in the hands of another person, deriving its "value solely from that which it represents, the same "property is twice taxed.

"5. When a tax is levied against a corporation "upon all its property, and a tax is also levied upon "the value of the shares in the hands of the stock- "holders, that which makes up the value of the prop- "erty of the corporation and the value of the shares "of the stockholders is one and the same thing, and "under such a system of taxation the same property "is twice taxed."

Ga. R. R. & B. Co. vs. Wright, 125 Ga., 589.

In this State the Statute fixed a method of taxation on this property, covering the taxes it owes, for its entire value.

Its owner, the lessor, is paying and offering to pay these taxes.

The Comptroller General is refusing to take these taxes and demanding that the lessees pay on a system substituted by him, to-wit: full **ad valorem** taxation as against the lessees of the entire taxes on the property which a fee simple owner, in the absence of a special method, would pay.

This case is wholly unlike the case of

Jetton vs. University of the South, 208 U. S., 489.

There an exemption was limited for so long as the University remained the owner.

It made a contract, termed a lease, which was in fact a conditional sale, or rather a sale with certain conditions on which it might become again owner, and the case falls more within the class of

Wells vs. Savannah, 87 Ga., 397.

But even as to that, this case does not decide that the lessee under a lease is, or can be made, liable for **the taxes of the property.** The decisions in Tennessee are just to the contrary.

E. T. V. & G. Ry. Co. vs. Morristown, 35 S. W., 771; University vs. Skidmore, 87 Tenn., 155.

It only holds that Tennessee could, by Statute make a lessee liable for taxes on the value of his leasehold interest, whatever that might be. It expressly declines to decide how little that might be, but only that the lease in question created an interest that fell under the Statute passed by Tennessee in 1903, altering the previous rule which taxed the entire property to the lessor.

Jetton vs. University, etc., 208 U. S., 489, 503, 504.

In the Jetton case the property paid no taxes as long as the property remained that of the University.

The University parted with an interest and a Statute was passed to tax that interest in the hands of its owner.

In the case of E. T. V. & G Ry. Co. vs. Morristown the City of Morristown in Tennessee, before this Act of 1903 was passed, tried to tax the Railway Co. as the holder of a 99-year lease, on the leased property and the Supreme Court of Tennessee, decided that it could not be done; that the lessor alone was liable for the entire taxes.

E. T. V. & G. Ry. Co. vs. Morristown, 35 S. W., 771.

X.

The demand that these respondents, Louisville & Nashville Railroad, a corporation of Kentucky and the Atlantic Coast Line Railroad Company, a corporation of New Jersey, should pay to the State of Georgia taxes on stocks and bonds as insisted in the ninth ground for certiorari is without legal support.

As to 15,000 shares of Western Railway of Alabama stock its **situs,** so far as the corporation issuing it is concerned is in Alabama.

Jellenix vs. Huron Min. Co. 177 U. S. 1.
Delaware Lackawanna vs. R. Co. or Penn. 198 U. S., 341, 353, 357.

So far as the domiciles of these Respondents affect the question, such domiciles are respectively Kentucky and New Jersey.

So far as debentures and bonds are concerned, these are choses in action and are stated to be **assigned** to these Respondents. They certainly are therefore taxable **as**

their property (and it is as such that the Comptroller claims they owe taxes thereon) at their domiciles and not in Georgia. The Court below properly repelled this claim of taxation.

State Tax on Foreign Bonds, 15 Wall, 300.
Kirtland vs. Hotchkiss, 100 U. S., 491, 498.

B.

ON THE CROSS APPEAL.

The property in the Atlanta Joint Terminals are:

1st. The original terminals and main line of the Georgia Company reaching from the City limits to the Union Passenger Depot in the City of Atlanta.

2nd. Certain property of the West Point Company.

3rd. Certain property of the Louisville Company.

(Supplemental Transcript, pp. 4, 5, 6.)

(Amended Answer Transcript, pp. 43, 44.)

The assessment on the main line expressly excludes the part embraced in the terminals. (Transcript, p. 19.)

The terminals expressly include the entire system of tracks from Central Avenue, between Decatur Street on the North and Hunter Street on the South, to the City limits. (Transcript, p. 44.) (Supplemental Transcript, pp. 5, 6.)

Hence these terminals confessedly embrace a part of the original Georgia Railroad, and a tax on them is in large part on the leased property.

The description in the terminal agreement shows the other properties are severed by this Georgia Railroad, and border on its main line and tracks. (Supplemental Transcript, pp. 4-7.)

XI.

As to the property derived from the Georgia Company, it is taxable to that Company as landlord and not to Complainants as lessees; as to that derived from the other companies, they should be taxed on it.

It is not pretended that the **Georgia Company** has made any other contract than the lease of 1881, or that the lessees have any other or different interest in the property of that Company used in the Joint Terminals at Atlanta. The relations between the Georgia Company and the lessees, as to it, are no different than they were before any Joint Terminal Agreement between the lessees, the West Point Company and the Louisville Company, was made, and are the same as exist as to the main line lying beyond such Terminals.

It must be conceded that such property is used, and necessary for use as, a part of the Georgia Railroad.

Under the decision of the Court as to the liability of these complainants in the rest of this case, the Georgia

Company, and not the lessees, was liable to the State for taxes on a considerable part of this terminal property, i. e., its own original property.

Also if any property, the title to which was in the Georgia Company has been added to its property, which (like the Washington Branch) was not under its charter scheme of taxation, it, as lessor, and not the lessees, was liable for whatever taxes were due thereon.

The property which was conveyed under the Terminal agreement by the West Point Company and Louisville Company to the Complainants remained in their control jointly with the Complainants. The West Point Company only transfers certain leaseholds interests. It goes under such joint control for a term ending April 1st, 1980. Whatever title is transferred by the Louisville Company to its property contributed to this arrangement, is necessarily limited by the terms of this Joint Terminal Agreement, which only lasts for the remainder of the term of the lease of the Georgia Company or until April 1st, 1980. It was not greater than a leasehold. (Supplemental Transcript, pp. 3, 5.)

It, therefore, remains property taxable separately to the West Point Company and the Louisville Company, as the true owners.

It is simply a method of each Company for providing terminals by joint arrangement for its separate benefit, and does not alter its interest in its own property and the liability to pay taxes on its property, embraced in the arrangement, just as before the arrangement was made.

The proposition that this joint use of the Georgia Railroad and Banking Company terminals is not in the interest of that Railroad or its business, or that such use is an alienation thereof, is not only wholly unsupported by the agreed statement of facts but is in the teeth of the decision of the Supreme Court of Georgia on the legal status of a practically similar arrangment.

Ga. R. R. & B. Co. vs. Maddox, 116 Ga., 64.

To tax the lessees of the Georgia Company under a demand for returns of the leased property, for this property of the Atlanta and West Point Railroad Company and the Louisville and Nashville Railroad Company held under this separate agreement undoubtedly would be the equivalent to demanding a tax return from A as the Executor of B, and taxing him under such proceeding as Trustee of C, because forsooth B's estate adjoined the Trust property of C and A managed both.

As to the State's policy regarding the joint use of terminals by Railroads in Cities:

> "Two or more chartered railway companies whose "lines terminate in the same city, may, by contract, "within the corporate limits use the same track in "common, with or without common ownership, and "when they do so the company owning the track is "not responsible to its employees for injuries sus- "tained solely by reason of the negligent use of the "track by the employees of the other company."

Code of 1910, Section 2229.

XII.

No taxes can be lawfully collected of these lessees as to Atlanta Joint Terminals under the assessment sought to be here enjoined.

1. We have shown that inextricably intermingled in this assessment is the property of the Georgia Company, taxable only through the tax of one-half of one per cent on the net income.

It is impossible therefore to sustain, or to divide, this assessment. It is illegal as a whole and indivisible without a new assessment. The parties so concede in their Statement of Facts. The last sentence is that

> "If under the pleadings and under this statement "it is finally decreed that some part of said prop- "erty is subject to taxation, the taxable valuation "thereof is to be ascertained by such proceedings as "are lawful and proper." (Transcript, p. 81.)

The opinion of the Court on final hearing recognizes this. (Transcript, p. 94.)

Although therefore it is clear that this assessment includes property which is not taxable ad valorem, the Court by decree leaves the defendant at liberty to issue execution and collect on this entire assessment. (Transcript, pp. 95, 96.)

It is submitted that even if these complainants are taxable on these Terminals, this assessment should have at least been enjoined, with leave to make another, excluding the Georgia Company's property.

2. But this entire assessment made against this Atlanta Joint Terminal as a part of the Georgia Railroad property is illegal.

If this property is taxable it is not taxable as a part of the Georgia Railroad leased properties against its lessees.

This assessment is made by the Comptroller by Statutory authority authorizing him to tax railroads.

This assessment is to tax the Georgia Railroad and its branches and terminals and to make the lessees pay the taxes instead of the lessor. The answer so admits. (Transcript, p. 22.)

Now it is proposed to concede that that attempt is illegal; but under that attempt because it is insisted that the lessees (without further interest acquired from the lessor) have used some of the leased property by agreement with other carriers operating other lines of Railroad in conjunction with other property to create a "Separate partnership interest" (see amended answer); this other property is taxable under the original assessment of the Georgia Railroad.

It is submitted that if these Joint Terminals are taxable, they are not taxed by an assessment against the

Georgia Railroad specifying, as one item, its main line from Augusta to Atlanta, exclusive of terminals, under a succeeding item of the same assessment assessing the Atlanta Terminals of that road.

If the State claims there is a taxable entity apart from the Georgia Railroad, embracing other and different property, created by another agreement, to which the Georgia Company is not even a party, she should assess that "separate partnership," or at least make a separate assessment against its properties.

Where an assessment is illegal as a whole and indivisible, it must fall, even though a legal assessment might be made.

Norwood vs. Baker, 172 U. S., 269, 292;
Oklahoma vs. Wells Fargo Co., 223 U. S., 298, 301.

We insist, in conclusion, that the points stated at the beginning of this brief are supported by the facts of this case and the law applicable thereto, and under the same:

(a) That the Georgia Railroad and Banking Company is the sole tax payer as to all properties owned by it, and the assessment of any of them to the Complainants was illegal.

(b) That there is no law in Georgia for taxing a lessee on a supposed separate leasehold interest value.

(c) That all railroad property and equipment owned by the Georgia Railroad and Banking Company is one and indivisible, operated under an indivisible franchise

and could not be parceled for any purpose between lessor and lessee.

(d) That all such property, except the Macon and Augusta and Washington Branch Railroads fall under the taxing scheme of Section Fifteen of the Charter.

(e) But if not, then like the Macon and Augusta and Washington Branch Railroad it is taxable by the State only to the Georgia Railroad and Banking Company and not to these complainants.

(f) That as to all property the title to which is not in the Georgia Railroad and Banking Company, it is owned by other corporations and is taxable to them and not to these Complainants as lessee of the Georgia Railroad and Banking Company.

(g) That as a consequence complainants were entitled to a decree as prayed, perpetually enjoining the enforcement, by defendant of this assessment for taxes against them.

JOS. B. CUMMING,
ALEX C. KING,

Of Counsel for Respondents.

JOS. B. & BRYAN CUMMING,
McDANIEL & BLACK,
R. C. & PHILIP H. ALSTON,
TYE, PEEPLES & JORDAN,
KING & SPALDING,
and UNDERWOOD,

Solicitors for Respondents.

Supreme Court of the United States

OCTOBER TERM, 1952

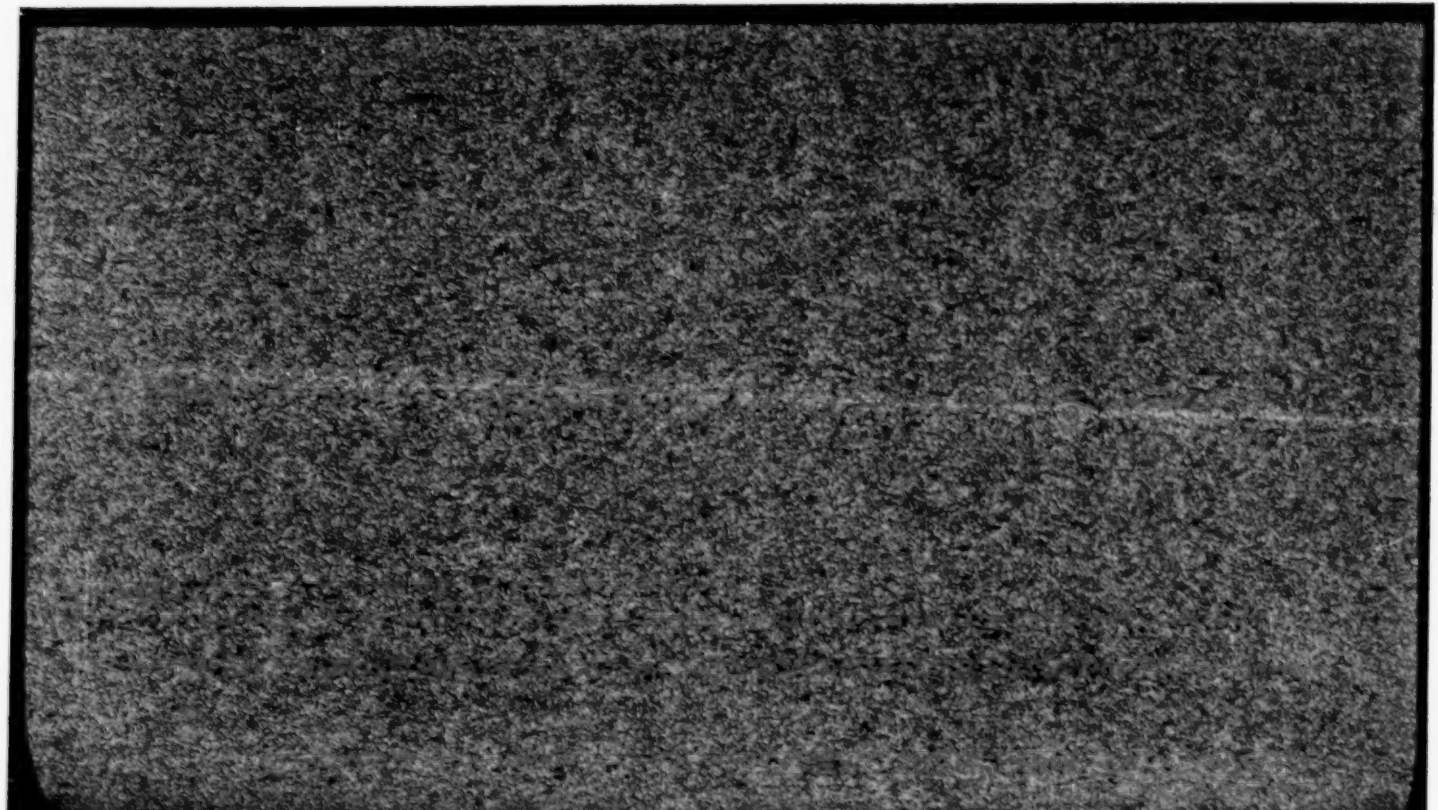
No. [illegible] 1952

LOUISVILLE & NASHVILLE RAILROAD COMPANY
AND
ATLANTIC COAST LINE RAILROAD COMPANY,
Cross-Petitioners,

versus

WILLIAM A. WRIGHT, Commissioner, etc.,
Cross-Respondent.

CROSS PETITION FOR ADDITIONAL WRIT OF CERTIORARI



IN THE

Supreme Court of the United States

LOUISVILLE & NASHVILLE RAILROAD COMPANY

AND

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioners,

versus

WILLIAM A. WRIGHT, Comptroller General of Georgia

Respondent.

CROSS PETITION FOR ADDITIONAL WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The petition of the Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company showeth:

1. That your petitioners are the respondents to a petition for a writ of certiorari to be directed to the United States Circuit Court of Appeals, Fifth Circuit, which was presented to this Honorable Court on May 5th, 1913, by William A. Wright, Comptroller General of Georgia, against your petitioners.

2. That on May 12th, 1913, this Honorable Court granted said writ and an order for its issuance was entered, which directed the Record in said case to be sent up as prayed for in said petition for certiorari.

3. That while said Wright, Comptroller General as aforesaid, was appellant and your Petitioner Appellees in said cause in said Circuit Court of Appeals; your petitioners were also cross appellants therein.

4. These petitioners show that:

Said case originated in a bill in equity filed by petitioners, citizens of other States, as complainants against William A. Wright, Comptroller General of Georgia, a citizen of Georgia, alleging that the Georgia Railroad and Banking Company (hereinafter styled Georgia Company) was chartered by an Act of the Georgia Legislature approved December 21st, 1833, with several amendments enacted prior to January 1st, 1863, with authority to build a road from Augusta, Georgia, to Atlanta, Georgia, and a branch to Athens, Georgia, which road it built. (Transcript, p. 2.)

Under an amendment approved January 21st, 1852, said Georgia Company acquired a branch railroad eighteen miles long, extending from Barnett on its main line to Washington, Georgia. (Transcript, p. 2.)

In 1879, by Legislative authority, it acquired the Macon and Augusta Railroad, seventy-eight miles long, extending from Warrenton, Georgia, to Macon, Georgia.

On May 7th, 1881, under authority granted by its original charter, said Georgia Company leased all of its said Railroads with their franchises and appurtenances, and, certain properties, to William M. Wadley, and his assigns, for a term of ninety-nine years from April 1st, 1881. Complainants by various conveyances, contracts and judicial proceedings have become the lessees of said railroad properties under said lease and have been so operating them for many years. (Transcript, p. 2.)

A copy of said lease to Wadley is Exhibit A of the Bill. (Transcript, pp. 10-17.)

Under Section 15 of the Charter of the Georgia Company its said railroads from Augusta to Atlanta and said branch to Athens, their appurtenances and franchises are exempt from all taxation, except a tax of one-half of one per cent of the net earnings of said designated railroads.

Such tax has been continuously paid by said Georgia Company since it became incorporated, until and including the year 1909. (Transcript, pp. 2-3.)

From 1903 to 1910 said Comptroller General sought to compel said Georgia Company to pay taxes on all of the said railroads to the State of Georgia and to the Counties, Municipalities and School Districts on the line of said railroads. (Transcript, p. 3.)

The Supreme Court of the United States having held said railroads were not subject to ad valorem taxes, in-

cluding a so-called "franchise" tax, and that the Legislation of Georgia, so far as it sought to impose any such taxes on said Georgia Company, was unconstitutional, null and void, said defendant, having failed in his effort to so tax said Company, is seeking to levy the same taxes on the same property against complainants as tenants of the owner: i. e., as lessees of said Georgia Company. (Transcript, p. 3.)

During the time in 1910 fixed by law for making tax returns by Railroad Corporations, said Georgia Company tendered to the Comptroller General a Tax Return of its railroads and other properties. As to all of its railroads and appurtenances, except the Macon and Augusta Railroads and Washington Branch Railroad, its return was based on its charter provision providing that the taxes thereon should not exceed one-half of one per cent on the net income of its investments. The Macon and Augusta Railroad and Washington Branch Railroad it returned for ad valorem taxation. (Transcript, p. 3.)

The Comptroller General on May 18th, 1910, demanded that the complainants as lessees of the Georgia Company do return its properties. They declined to do so on the ground of the special scheme of taxation aforesaid, which had been sustained by the United States Supreme Court, and which relieved its property, except the Washington Branch, and Macon and Augusta Railroad and appurtenances, from other taxation; and on the further ground that complainants as tenants were not liable for taxes on the leased property; that the Georgia Company was the proper party to return and pay all taxes on all prop-

erty, the title to which was in said Georgia Company; that the State of Georgia had no legal right to demand either the return or payment of taxes from the Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, as lessees, of said Georgia Company. They had been informed of the return made by the Georgia Company. (Transcript, pp. 3-4.)

The Comptroller General, on July 26th, 1910, assessed to these complainants, as the parties operating under lease from said Georgia Company, the railroad known as the Georgia Railroad, with the appurtenances and franchises thereof and all property connected with or used in the operation of said railroad under the following divisions:

The railroad from Barnett to Washington.

The railroad from Union Point to Athens.

The railroad from Augusta to Atlanta (exclusive of terminals.)

Rolling stock and other property used in connection therewith, including stocks and bonds leased.

Tracks and buildings and other property known as Atlanta Terminals.

Tracks, buildings and other property known as Augusta Terminals.

A copy of said assessment is Exhibit B of said Bill. (Transcript, pp. 4, 18, 19.)

Complainants deny that they have any such right, title

or interest in the property assessed as makes them liable for the taxes thereon. They aver that the property belongs solely to the Georgia Company, which has never parted with its right, title or estate therein, and which alone is liable for taxes thereon. Complainants are merely tenants for a term of years, which may in certain contingencies, expressly provided in the lease, terminate at any time prior to the end of the term named. (Transcript, p. 5.)

The Georgia Company has always recognized its obligation to pay the taxes on the railroads and property rented to complainants and during the twenty-nine years of the lease prior to 1910 the State has recognized this status and collected said taxes from said Georgia Company, and the defendant has accepted for this year 1910 (for which he now demands that said lessees make the return of said railroads, etc.,) and has received the return of the Macon and Augusta Railroad from said Georgia Company and will in due time collect the tax on said Macon and Augusta Railroad from said Georgia Company. (Transcript, pp. 5 and 6.)

It is averred that this property is not exempt from taxation, but is taxable under the charter provision by a tax of one-half of one per cent on its net earnings. That this was not a personal privilege, but a scheme of taxation inhering in this particular property and annexed to it.

But this property has remained, and still is, the property of the Georgia Company alone, and it is alone liable for its taxes. (Transcript, pp. 6, 7.)

There is no law in Georgia for passing over the owner of property and taxing his renter.

Taxes on property are never charged to renters, tenants or lessees in Georgia, and if complainants are now taxed, as defendant is attempting, they will be denied the equal protection of the laws, and their property will be taken without the due process of law, all in violation of the Fourteenth Amendment of the Constitution of the United States. (Transcript, p. 8.)

They pray:

First. That complainants be held not liable for any of the taxes assessed by Exhibit B.

Second. That defendant be enjoined from further charging complainants therewith, or issuing any execution therefor.

Third. For general relief. (Transcript, p. 9.)

5. The answer contended that as to the original railroads, petitioners had become under the said lease for 99 years the substantial owners of the property for the time being, and liable for taxes thereon, and that they had expressly agreed in said lease to pay all taxes on the property; that if not the substantial owners, they at least acquired a leasehold interest in said leased property that was very valuable, and liable to taxation against them; that under the terms of said lease petitioners were to be paid at the termination of the lease for all betterments placed upon the property, and that petitioners

had out of their own unexempt funds placed betterments thereon in a sum of six millions of dollars, to the use of which they were entitled for 99 years, and to payment therefor at the end of the lease, and of which they were the owners; also that the rolling stock of $2,500,000 had been bought entirely by petitioners with their own funds, and had never belonged to the Georgia Railroad & Banking Company, and never would, unless purchased and paid for at the termination of the lease; that the stocks and bonds assessed had been assigned to and vested in petitioners by said lease; and that the Atlanta Terminals had been constructed by petitioners with unexempt funds of their own, and on land the title to which was for the most part in them, and under a contract for their joint use for the period of said lease by petitioners and other railroad companies, as a distinct and separate enterprise from the Georgia Railroad. The answer prayed that defendant be left free by the decree of the Court to assess and collect ad valorem taxes on the whole property assessed, but if any were not taxable ad valorem, then on such as was so taxable, under proper proceedings under the tax laws.

6. A stipulation was made as to the facts. (Transcript, pp. 64-81.)

7. On the hearing the Circuit Court decreed that the Atlanta Joint Terminals were subject to ad valorem taxation, but that the petitioners had no taxable interest in any of the other property, but the same was covered by the charter of the Georgia Railroad and Banking Company and taxable only as therein provided and

a decree was entered enjoining the defendant from seeking to collect ad valorem taxes from petitioners on anything except said Atlanta Joint Terminals.

An appeal was thereupon prosecuted by said Wright to the Circuit Court of Appeals of the Fifth Circuit which Court affirmed the decree of the Circuit Court, its only opinion filed being as follows:

> "By the Court: For the reasons given in the opinion of the trial judge found in the transcript, the decree appealed from is affirmed."

8. Petitioners show that in said petition for certiorari heretofore presented by said Wright it is not disclosed that your petitioners, Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, at the time said Wright, Comptroller General, presented his appeal, also presented a cross-appeal from so much of said decree as held that the Atlanta Joint Terminals were subject to ad valorem taxation and which refused to enjoin him from enforcing his assessments against said Terminals, or the collection of the taxes thus assessed.

9. This decree was by the Circuit Court of Appeals affirmed through its decision above quoted.

10. Your petitioners show that manifest error has been committed against them as thus affirming so much of said decree as holds said Atlanta Joint Terminals were subject to ad valorem taxation and in refusing to enjoin the collection of such taxes.

11. Your petitioners show the following errors (amongst others) have been committted agains them in the judgment of the Circuit Court of Appeals for the Fifth Judicial Circuit affirming the judgment of the Court below in this:

(1.) Because the Court erred in decreeing that the Atlanta Joint Terminals as assessed by the respondent, as shown in said bill of complaint, were subject to ad valorem taxation, it appearing from the agreed statement of facts, and the exhibit thereto, that a large part of said Atlanta Joint Terminals consisted of property received and held by the said petitioners under the lease of the Georgia Railroad and Banking Company to Wm. A. Wadley, and as to which the said petitioners hold only a usufruct.

(2.) Because said property just mentioned, received under said lease, formed an integral and essential part of said Atlanta Joint Terminals, as shown by the pleadings, and agreed statements of facts in said case, that the said assessment of the said comptroller included as an integral and essential part thereof such property, which was not subject to ad valorem taxation and its presence in said assessment vitiated the entire assessment of said Atlanta Joint Terminals.

(3.) Because under the facts of said case the assessment of said Atlanta Joint Terimnals as made by the comptroller general, as against these petitioners, under a demand for a return of the properties known as the Georgia Railroad, operated by them, was illegal, without the authority of law, and should be enjoined.

(4.) Because the Court erred in holding in this case that said Atlanta Joint Terminals were liable to ad valorem taxation, as against these petitioners, under the assessment of the said comptroller general sought to be enjoined.

(5.) Because the demand for return made upon these petitioners and the assessment made against them, as appears in the record in this case, were solely as lessees of the Georgia Railroad and Banking Company, on the ground that they as such lessees were bound to return its property for taxation and to pay ad valorem taxes upon the whole thereof; that these petitioners as such lessees of said Georgia Railroad were not liable to be taxed or to have assessed against them for taxation any of the said property held by them as lessees of the Georgia Railroad under said lease.

(6.) Because any decree seeking to tax property other than that held by these petitioners as such lessees is not germane to the demand for taxes made, and is not on property embraced in the assessment attempted to be made against these petitioners jointly as such lessees.

(7.) Because it appears from the facts of said case that petitioners, as lessees, have no such interest or estate in any of the property involved in said Atlanta Joint Terminals as renders the same subject to taxation against them, but that under the laws of Georgia governing taxation the same should be assessed for taxation against the respective owners thereof, each and all of whom it appears are taxpayers of the State of Georgia,

and against whom taxes can be levied and collected if due.

(8.) Because, as your petitioners also show, the opinion of the Circuit Court rendered on final hearing and adopted as its opinion by the Circuit Court of Appeals of the Fifth Circuit as to the Atlanta Joint Terminals rules as follows:

> "There may be some part of this terminal prop-
> "erty which amounts to a mere betterment of
> "the old property, and not thus subject, but what that
> "may be I am unable at present, from the facts be-
> "fore me, to determine. Counsel agree, as I under-
> "stand it, that should this property be found so sub-
> "ject, it would require either a reference or some fur-
> "ther action to determine this."

The Court, therefore, should have enjoined the enforcement of the present assessment of said Joint Terminals without prejudice to a new one in conformity with the opinion, or have ordered a reference.

(9.) Because in the stipulation as to the facts under which this case was tried the parties to the cause agreed as follows:

> "If under the pleadings and this statement it is
> "finally decreed that some part of said property is
> "subject to taxation, the taxable valuation thereof
> "is to be ascertained by such proceedings as are law-
> "ful and proper."

This Jan. 20, 1912.

(Signed by counsel for complainants and defendant.) (Transcript, p. 81.)

Under this stipulation, the Court having found the Atlanta Joint Terminals to be taxable, but to contain probably non-taxable values which he could not separate, the true taxable valuation should have been ascertained by proper proceedings and the old assessment which mingled property of the old lessor with newer acquisitions should be enjoined.

Your petitioners show that as this Honorable Court has by Writ of Certiorari ordered the Record sent up and as no additional record exists in the Court below save that called for on said Comptroller General's appeal, it cannot encumber the Court that the papers pertaining to said cross-appeal be likewise ordered to be sent up so that said Supreme Court having the entire record before, may be able to finally adjudge the right of all parties to the controversy set up in said complete cause.

Petitioners also show that the consideration of said questions raised by the direct appeal compel a consideration of those made on the cross-appeal and it will conduce to the convenience of the Court if the entire record and said papers in said appeal and cross-appeal are sent up and said decree on said cross-appeal be opened for decision by this Court.

Petitioners present herewith a complete transcript of the record in said cause from which the full facts will more clearly appear, and present also herewith a brief

memorandum in support of this, their cross-petition for the writ of certiorari.

Wherefore, your petitioners pray:

That this Honorable Court will grant a writ of certiorari directed to the Circuit Court of Appeals of the Fifth Circuit, directing that the record of said case be brought before this court for its decision, and that said decree, as appealed from by said cross-appeal, in so far as it is adverse to your cross-petitioners be reversed, and such judgment be given as is in accordance with law and equity.

LOUISVILLE & NASHVILLE RAILROAD CO.,

ATLANTIC COAST LINE RAILROAD CO.,

Petitioners for Cross-Writ of Certiorari.

State of Georgia.
———— County. ss.

Personally before the undersigned officer authorized to administer oaths came Thomas K. Scott, who on oath saith that he is Manager of the said Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company in respect to all matters arising out of, or connected with, the lease of the Georgia Railroad and Banking Company to William M. Wadley, and as to the matters connected with the litigation aforesaid, and that the allegations of fact in said Cross-petition for the writ of Certiorari are true, save where stated on information and belief, and these he believes to be true.

Sworn to and subscribed before me this ——— day of June, 1913.

.....

.....
Notary Public,

..... County, Georgia.

SHORT MEMORANDUM IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI.

The error complained of in the Cross-appeal was that the Court below refused to enjoin the enforcement of the Assessment of the Comptroller of the property known as Atlanta Joint Terminals, but suffered him to proceed with the complete enforcement of such assessment.

Of what the Atlanta Joint Terminals consist, is set forth in the Exhibit to the Agreed Statement of Facts to be found in the Record. (Supplemental Transcript, pp. 4, 5.)

It is described in part as follows:

> "The roadbed, right-of-way, and all other prop-
> "erty and real estate, beginning at Central Avenue,
> "at the connection with the tracks of the Western &
> "Atlantic Railroad, and extending east between the
> "property lines of the Georgia Railroad as they may
> "vary (said property being substantially bounded on
> "the north by Decatur Street, and on the south by
> "East Hunter Street, Oakland Cemetery and prop-
> "erty owned by other parties) to a point eleven hun-
> "dred (1100) feet east of the eastern connection of
> "the Atlanta Belt Line with tracks of the Georgia
> "Railroad as it now exists."

This property is in the main a part of the original Georgia Railroad constructed under the Charter of 1833, and a part of the premises leased in 1881 to which the

special scheme of taxation of such charter was held applicable by this Court in

Wright, Comptroller General, vs. Ga. R. R. & Bkg. Co., 216 U. S., 420.

Therefore, even under a decree finding that other property not taxable under said charter scheme was included in said Atlanta Joint Terminals, this, its centre strip, is and has always been embraced in said charter scheme.

(1) The stipulation of the Agreed Statement of Facts provides as follows:

> "If under the pleadings and this statement it is "finally decreed that some part of said property is "subject to taxation, the taxable valuation thereof is "to be ascertained by such proceedings as are lawful "and proper.
>
> "This Jan. 29, 1912."

A decree which affirms this assessment, including this property not subject to ad valorem taxation, is under such stipulation clearly erroneous.

The language of the opinion concedes that a reference or some other method of ascertaining the real value of any property found taxable applies.

> "There may be some part of this terminal prop- "erty which amounts to a mere betterment of the old "property, and not thus subject, but what that may "be I am unable at present, from the facts before me, "to determine. Counsel agree, as I understand it,

"that should this property be found so subject, it "would require either a reference or some further ac- "tion to determine this."

We, therefore, insist that to affirm so much of this decree would be inequitable, no matter what view the Court takes of the original appeal.

It is submitted that even if these complainants are taxable on these Terminals, this assessment should have at least been enjoined, with leave to make another, excluding the Georgia Company's property.

(2) But this entire assessment, made against this Atlanta Joint Terminal as a part of the Georgia Railroad property, is illegal.

If this property is taxable it is not taxable as a part of the Georgia Railroad leased properties against its lessees.

This assessment is made by the Comptroller by Statutory auhority authorizing him to tax railroads.

This assessment is to tax the Georgia Railroad and its branches and terminals and to make the lessees pay the taxes instead of the lessor. The answer so admits.

Now it is proposed to concede that that attempt is illegal; but under that attempt because it is insisted that the lessees (without further interest acquired from the lessor) have used some of the leased property by agreement with other carriers operating other lines of Railroad in conjunction with other property to create a "Separate partnership interest" (see amended answer); this other

property is taxable under the original assessment of the Georgia Railroad.

It is submitted that if these Joint Terminals are taxable, they are not taxed by an assessment against the Georgia Railroad specifying, as one item, its main line from Augusta to Atlanta, exclusive of terminals, under a succeeding item of the same assessment assessing the Atlanta Terminals of that road.

If the State claims there is a taxable entity apart from the Georgia Railroad, embracing other and different property, created by another agreement, to which the Georgia Company is not even a part, she should assess that "Separate partnership," or at least make a separate assessment against its properties.

Where an assessment is illegal as a whole and indivisible, it must fall, even though a legal assessment might be made.

Norwood vs. Baker, 172 U. S., 269, 292;
Oklahoma vs. Wells Fargo Co., 223 U. S., 298, 301.

All of which is respectfully submitted.

JOS. B. CUMMING,
ALEX. C. KING,
Of Counsel for Cross-Petitioners.

JOS. B. & BRYAN CUMMING,
McDANIEL & BLACK,
R. C. & PHILIP H. ALSTON,
TYE, PEEPLES & JORDAN,
KING SPALDING
and UNDERWOOD,
Solicitors for Cross-Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 162.

WILLIAM A. WRIGHT,
COMPTROLLER-GENERAL OF GEORGIA,
Petitioner,
versus
LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY,
Respondents,
And Five Cases.

Writ and Cross-Writ of Certiorari to Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR

WILLIAM A. WRIGHT, Comptroller-General

BY

SAMUEL H. SIBLEY

Chas. P. Byrd, State Printer, Atlanta.

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IN THE
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WILLIAM A. WRIGHT, COMPTROLLER-GENERAL OF GEORGIA, Petitioner. *versus* LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY, Respondents. And *Vice Versa.*	Writ and Cross-Writ of Certiorari to Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR WILLIAM A. WRIGHT, COMPTROLLER-GENERAL,

BY SAMUEL H. SIBLEY.

STATEMENT OF CASE.

In 1831 the State of Georgia chartered the Georgia Railroad and Banking Company with authority to construct certain railroads, providing in the charter that:

> "The stock of said company . . . . shall be subject to a tax *not exceeding* one-half per cent. on the net proceeds of their investments."
> Act Dec. 27, 1831, Sec. 15.

Later, the scope of the roads having been enlarged, the charter was amended so as to increase the capital stock:

> "The Georgia Railroad and Banking Company shall have and is hereby invested with full power to increase their capital to an amount *not exceeding* four million dollars."
> Act Dec. 25, 1847, Sec. 8.

Stock to this amount was issued. The roads authorized by the charter were then completed. By the Act of January 21, 1852, a consolidation was made with the Washington Plank Road Company, and the Washington Branch Railroad, from Barnett to Washington, was acquired, and stock to the amount of $156,000 issued therefor. Under the Act of October 5, 1868, stock to the amount of $44,000 was again issued. The Macon and Augusta Railroad was in 1878 bought by the issue of bonds.

There was never any issue as to the taxability of the last-named road. A series of litigations first in the State and then in the Federal Courts, in which the Georgia Railroad and Banking Company sought to defend itself and its other property from ad valorem taxation by virtue of its charter provision as to taxes, resulted in a decree, as modified by this court, whereby it was settled that that company was not protected by its charter from ad valorem taxation of the Washington Branch Railroad, nor on so much of its property as was represented by the $44,000 of stock last issued; but was protected from such taxation on its charter railroads, although the value of them had grown by natural increase, and additions and betterments made by that company, otherwise than by the use of new stock or the issuance of bonds.

Wright, Comptroller, vs. Ga. R. R. and Bkg. Co., 216 U. S. 420.

In the meanwhile, though the fact was disregarded by the Comptroller-General, the Georgia Railroad and Banking Company had ceased to operate its roads itself, and had leased them for ninety-nine years to Wm. M. Wadley, and his assigns. The Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, foreign corporations respectively of Kentucky and New Jersey, had by purchase, become the joint owners of the lease. Styling themselves in the conduct of this joint business as "Lessees of the Georgia Railroad," they had overhauled the railroads, added sidetracks and depots, built expensive bridges, acquired additional tracts of land, some in their own name, and some in the name of the Georgia Railroad and Banking Company, but all at their own expense and for their own use during the lease; and built an additional mile of track at Athens, one terminus; expensive buildings and depots at Augusta, another terminus; and at Atlanta had set apart some of the leased ground to still another separate, distinct use, in connection with other realty leased, and purchased in their own names as lessees, to-wit: a joint terminal enterprise with a separate management, and for the equal use of four railroad systems including the Georgia Railroad.

In 1910, the Comptroller-General, taking official cognizance of this situation, called upon the Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, in respect of their joint business aforesaid (in the conduct of all of which they styled themselves "Lessees of the Georgia Railroad,") to make returns of their property as railroad companies doing business in Georgia. They declining to do so, he assessed,

as authorized by law, the properties jointly operated by them as aforesaid, assessing separately the charter railroads from Augusta to Atlanta, and from Union Point to Athens, with the rolling stock and personal property used therewith, including certain stocks and bonds; the railroad from Barnett to Washington, with its rolling stock and personal property; the tracks and buildings and other property at Atlanta known as the Atlanta Joint Terminals; and the track, buildings and other property at Augusta known as the Augusta Terminals.

No complaint is made of *the amount* of these assessments, but the Lessees filed their bill in the Circuit Court to obtain an injunction against the enforcement of this assessment, and for an adjudication "that they were not chargeable with taxes or any part of them on the property included in the assessment."

The Comptroller answered claiming in substance that the complainants were chargeable with the whole taxes, and that his assessments should proceed; but if not, they were chargeable with taxes on part of the property, and on a very valuable interest in the rest of it, and that he should in no case be totally enjoined but allowed to proceed under the laws for all taxes that the complainants were liable for.

The complainants sought by exceptions for impertinence to restrict the enquiry to the naked question of injunction of the assessment as it stood, but these exceptions were overruled, and the court decreed, after a hearing on bill and answer and an agreed statement of facts, that the Atlanta Joint Terminals were so far a separate enterprise that they were assessable and taxable to the lessees, and an injunction was refused as to that assessment; but it was ruled that as to all other property involved, and all interests in it, the lessees were not assess-

able, having a mere usufructuary interest, but all was taxable only to the Georgia Railroad and Banking Company, and (except as to the Washington Branch Railroad) was protected from any taxation other than that provided by its charter.

Appeal and cross-appeal were taken, the decree being affirmed by the Circuit Court of Appeals.

Hence the case came here on certiorari.

The errors alleged against the judgment of the Circuit Court of Appeals in the petition for certiorari are:

1. The Court erred in adjudging and decreeing that the lease executed by the Georgia Railroad and Banking Company exhibited in the bill did not vest any estate in the Lessee, but only a usufruct which is not subject to be taxed; and in not holding that said lease vested in the lessee such an estate as rendered the lessee the substantial owner for the time being of the leased property, and liable for the taxes thereof.

2. The Court erred in not adjudging that the lessees under said lease had a valuable interest and estate in the leased property in respect of which they were taxable, even if not liable for taxes on the entire value of the leased property.

3. The Court erred in not adjudging that the lessees were liable for ad valorem taxes on the betterments made by them on the leased property with their own money, for which they pay no increased rental, and for which they are to be reimbursed at the end of the lease.

4. The Court erred in holding that the rolling stock of the lessees is protected from ad valorem taxation by the provisions of the charter of the Georgia Railroad

and Banking Company, the same having been purchased and paid for by the lessees and never having belonged to the Georgia Railroad and Banking Company.

5. The Court erred in decreeing that the betterments made by the lessees on the leased property are protected from ad valorem taxation by the charter of the Georgia Railroad and Banking Company, the same having been made with their own money, for their own use and benefit, and which they will use without rent, and for which they will be paid before surrendering them at the end of the lease.

6. The Court erred in not holding that the charter contract as to the taxation of the Georgia Railroad and Banking Company was personal to that company, and that respondents could take no advantage from it.

7. The Court erred in not adjudging that the Augusta Terminal and Athens Extension and Terminal are covered by said charter, and not subject to ad valorem taxes, it appearing that each was constructed at the expense of the lessees for their own use and benefit, that they pay no rent therefor, and will be compensated therefor at the termination of the lease.

8. The Court erred in not holding that the original leased property, in so far as it represented the investment not of stock of the Georgia Railroad and Banking Company, but the investment of its bonds, especially seven hundred thousand dollars disclosed by the stipulation of facts to have been invested in steel rails, depots and round houses, was subject to ad valorem taxation.

9. The Court erred in not holding the lessees liable for ad valorem taxes on the stocks and bonds assigned to them by said lease, especially the stock in the Western

Railway of Alabama, which is a corporation of the State of Alabama, the debentures of the Atlanta and West Point Railroad, and the bonds of the Monroe Railroad.

BRIEF OF LAW AND ARGUMENT.

I. The Scope of the Case.

Ever since the filing of the Comptroller's answer, by exceptions thereto, and by argument at all stages of the case, the complainants have sought to narrow the point decided to the technical sufficiency of the particular assessment sought to be enjoined. It being the duty of the taxpayer under the Georgia law to declare the amount and status of his property to the tax officer, when that duty is omitted, and the tax officer assesses from the best information he can procure, and is enjoined by a court of equity at the instance of the tax payer, it would be monstrous for that court to refuse to enquire into the full merits of the controversy. Equity having the parties and subject matter before it, would grant full relief:

> Story Equity Pl. Sec. 72.
> Georgia Code, Sec. 4522.

But this bill itself not only prays for an *injunction of this assessment,* but prays also for a *declaratory decree*:

> "First, That it be adjudged that your orators are not or either of them chargeable with taxes or *any part of* them on *the property included* in the assessment aforesaid."

A decree in accordance with that prayer would plainly forever estop the Comptroller from claiming that the complainants owed *any* taxes on *any part* of that property or *any interest* in it. Therefore of necessity the

court must enquire fully into all parts and interests in the property that the complainants may have, to reach a correct judgment. The Comptroller properly and necessarily presented to the Court every phase of ownership that the facts presented, for their present and perpetual settlement. The bill sought, and would obtain, a decree completely disposing of the tax liabilities of the complainants, and not simply disposing of this particular assessment. Not only the prayers of the petition, but the concluding contentions of the answer, and the agreed statement of facts, all looked to such an end, and contemplated further proceedings, if this assessment were invalid, to tax what was taxable, under the machinery of the laws, after definition by the court.

The exceptions were properly overruled:

> Walker vs. Jack, 88 Fed. 576, 16 Cyc. 315.
> Foster Fed. Practice, 551, 365.

II. The Rules of Decision.

The complainants are in possession of the property, enjoying its use. Presumptively it is taxable, and they owe the taxes:

> "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."
>
> Constitution of 1877, Art. 7, Sec. 2, Paragraph 1.
>
> "All real and personal estate, whether owned by individuals or corporations, resident or non-resident, is liable to taxation."
>
> Georgia Code of 1911, Sec. 1002.

Certainly no sort of exemption is to be supposed:

> "The universal rule in regard to taxation is that the power and right to tax *are always presumed.* The exemption from taxation must be clearly shown. Mere silence is the same as denial of the exemption."
>
> Phoenix Ins. Co. vs. Tennessee, 161 U. S. 174.
>
> "In all cases of doubt as to the legislative intention, or as to *the inclusion of particular property* the presumption is in favor of the taxing power, and the burden is on the claimant to clearly establish the exemption."
>
> 37 Cyc., p. 891.
>
> "One claiming in any form of action or proceeding that his property is exempt from taxation, must assume the burden of establishing the exemption by clear and satisfactory proof of all the facts and circumstances essential to the particular exemption under consideration."
>
> 37 Cyc., p. 907.
>
> "There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it should be *rigidly scrutinized,* and never permitted to extend *in scope or duration* beyond what the terms of the concession clearly require."
>
> Tucker vs. Ferguson, 22 Wall. 575, quoted in Wells vs. Savannah, 107 Ga., p. 4.

The doctrine of strict construction in favor of the taxing power extends to all phases of the enquiry.

> Berryman vs. Whitman College, ~~225~~ 223 U. S. 334, 350.

If this Court, in the absence of distinct decision by the State Court, is doubtful whether the State statutes would

or would not subject any of the property to general taxation, this court will resolve the doubt in favor of taxation.

> "When the question is whether property is exempt from taxation, and that exemption depends alone on a true construction of a statute of the State, the Federal Courts should be slow to declare an exemption in advance of any decision by the Courts of the State. The rule in such a case is that the Federal Courts follow the construction of the State Courts, and in advance of such construction, they should not declare property beyond the scope of the statute and exempt from taxation unless it is clear that such is the fact. In other words, they should not release any property within the State from its liability to State taxation unless it is obvious that the statutes of the State warrant such exemption, or unless the mandates of the Federal Constitution compel it."
>
> New Orleans vs. Stempel, 175 U. S. 309, quoted in Assessors vs. Comptoir National, 191 U. S. 402.

And, the statement of facts having been prepared by the complainants, if its language or silence raise doubts as to the status of any property, the doubts should be resolved in favor of taxation.

III. Contractual Restraint of Taxation is Personal.

The limitation on the taxing power in the charter of the Georgia Railroad and Banking Company is personal to that company, and does not run with the property, the Georgia Railroad. It is pertinent in dealing with that company as to any *taxes it* may owe, but *wholly irrelevant* in dealing with the complainants *about any taxes they may owe.*

That a contract limiting the power of taxation does not follow the property of the corporation with which

it was made, and is non-assignable without the express and clear consent of the State, and only at a time when it is permitted by the Constitution to give such consent, is fully and finally settled by

> Rochester vs. Rochester, 205 U. S. 236, 247, 254.
> Great Northern Railroad vs. Minnesota, 216 U. S. 206.

See also Pickard vs. E. T. R. R., 130 U. S. 637.

> L. and N. R. R. vs. Palmes, 109 U. S. 244.
> Morgan vs. Louisiana, 93 U. S. 217.

The lease under which complainants hold was made in 1881, after the adoption of the Constitution of 1877. That Constitution provided:

> "The right of taxation is a sovereign right, inalienable, indestructible, is the life of the State, and rightfully belongs to the people in all republican governments, and neither the General Assembly, nor any nor all departments of the government established by this Constitution shall ever have the authority to irrevocably give, grant, *limit or restrain* this right; and all laws, grants, contracts, and all other acts whatsoever by said government or any department thereof, to effect any of these purposes shall be, and are, hereby declared to be null and void for every purpose whatever; and said right of taxation shall always be under the complete control of, and revocable by the State, notwithstanding any gift, grant or contract whatsoever by the General Assembly."
>
> Constitution of 1877, Art. 4, Sec. 1, Par. 1.
>
> "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party."
>
> Constitution of 1877, Art. 7, Sec. 2, Par. 5.

The State, therefore, neither by act nor silence, could have consented to any transfer of the charter exemption of the Georgia Railroad and Banking Company to any one else.

The original charter, while permitting the lease of the company's property, by *no language anywhere* undertook to permit the transfer of the benefit of the tax contract, and such permission cannot arise from implication; even if such *antecedent* consent could have been *acted on* after 1877.

The very lease itself does not attempt to transfer such benefit to the lessee, but expressly provides that the Company will pay its own charter tax *on its net income,* but that the lessee shall pay *all property taxes* whatsoever.

The lessees therefore cannot claim either a legislative consent or a consent by the lessor to exercise the special privilege granted to the Georgia Railroad and Banking Company as to taxation.

IV. A Contract for Limited Taxation is Governed by the Same Rules as One for Total Exemption.

While many of the cases establishing the rules contended for have involved total exemptions from taxation, the essence of the matter lies in the *restraint in any manner by contract of the sovereign power of taxation.* Is there *a contract which limits* the power of taxation? If so, it is to be strictly construed, is personal to the person with whom made, and can pass to no other except by express consent of the State, equivalent to a new contract.

In Tucker vs. Ferguson, supra, the language is:

> "It (the taxing power) may be *restrained by contract* in special cases for the public good, where

such contracts are not forbidden. But there is no presumption in its favor. Every doubt should be resolved against it."

In Rochester vs. Rochester, page 247, the broad expression used is

> "Immunity from the exercise of governmental power."

In the Great Northern case, the contract was for an income tax as here. The contract was held non-assignable. (Page 222.)

In Stearns vs. Minnesota, 179 U. S. 255, Chief Justice White clearly states the gist of the matter to consist *in any restraint* of the power of taxation by contract.

The only cases in which a commuted system of taxation is held to *run with property* are where *land is granted by the taxing power* with such a system of taxation *as an incident of the tenure.*

See Great Northern case, 216 U. S., at page 232, 233.

In the present case the charter tax is a practical exemption. The taxes paid average under $3,000. (Record, page 60). Upon the unchallenged assessment of the Comptroller, about $14,000,000, the constitutional State tax of one-half mill on the dollar, would be $70,000, with county and municipal taxes due in addition.

V. Former Adjudications on This Charter.

None of the Georgia cases respecting the charter tax of the Georgia Railroad and Banking Company were decided since the lease, and so could not involve it.

The case of Wright vs. Georgia Railroad and Banking Company, 216 U. S. 420, while decided subsequently to the lease, did not involveit, nor any one of the facts now pressed by the Comptroller. The lease was not men-

tioned in the record, nor the fact that in addition to the increase in value of the property of $4,000,000 due to enhancement and expenditures by the Georgia Railroad and Banking Company, there had been nearly twice as much more expended by third persons, the lessees. There is no evidence that the tax officer had these facts brought to his official notice prior to 1910.

The complainants not being parties to that case, nothing could have been adjudicated as to their rights or status.

None of the questions now raised having been raised in that case, it is not even *authority* upon any of them.

Indeed, upon some of the points, the deliverance of the Court was very guarded:

> "An investment made nearly seventy five years ago of $4,156,000 has now a value of $4,000,000 in excess of that cost. The *property is the same property,* the conceded fact being that through renewals, alterations and betterments made from time to time and the natural increase in the value of the road, the appreciation has come about. There has been no suggestion that there has been *any hiding away of capital added,* by either new stock, or by the use of bonds or other form of credit, nor that the improvements made from time to time called renewals, alterations and betterments, have been other than the necessities of an enlarging business and the improved maintenance naturally demanded. There is no suggestion that there has been bad faith *in covering up taxable assets under cover of assets immune."* Page 430.

All of these things are now charged and shown.

The *only new capital* that *then appeared to have been added,* was the $44,000 of stock under the Act of 1868, and though that was added *by the company itself,* and not

by *a stranger, it was held and decreed* (as it had been before held by the Georgia Courts) to be taxable ad valorem. So the real force of the case as authority in the present case, so far as it touches it at all, is *that all new capital added* is taxable ad valorem.

VI. The Real Question in the Case.

Now that the full facts appear, the true question is:

Is the property assessed against the complainants, or any part of it, or any interest in it, taxable to them? If so, themselves having no special contract with the State, they must pay taxes ad valorem, as other persons in the State. If not taxable to them, the case is ended.

This is exclusively a question of State law. No Federal question whatever is involved.

VII. Long Non-Action by the Tax Department Immaterial.

It does not appear when the tax department ascertained the facts respecting this lease and expenditures under it. The Atlanta Joint Terminal development was not made till 1907. In the oath to his amended answer, made July 3, 1911, the Comptroller swears that the details of fact therein set out were not known to him at the filing of his original answer (Record, p. 35). *The duty under the law* was on the tax-payer to declare the facts about his property in a return, rather than on the Comptroller to ascertain them.

It would be strange, indeed, to hold that *an ignorant* inaction could illustrate the true law. It would not amount to any sort of effort by the tax department to construe the law.

Stranger still would it be to permit the tax-payer *to profit by his failure in the duty to disclose* his taxable property, because long continued.

If the conduct of the tax department was wilful and intentional in treating property as exempt which was not exempt, it could never under the Constitution of Georgia raise *any right* to have it continued.

See Constitution of 1877, Art 4, Sec. 1, Par. 1, quoted above.

VIII. Taxes are Chargeable to the "Owner" of Property.

> "All real and personal estate, whether owned by individuals or corporations, resident or non-resident, is liable to taxation."
>
> Code 1002.
>
> "All persons owning any mineral or timber interests or any other interest or claim in or to land less than the fee shall return the same for taxation and pay taxes on the same as on other property."
>
> Code 1008.
>
> "Taxes are to be charged against the owner if known, and against the specific property itself if the owner is not known. Life tenants, and those who own and enjoy the property, are chargeable with the tax thereon. Hence while the public may treat property as belonging either to the maker or holder of a bond for titles, when the latter is *in possession*, yet as between the parties the one *receiving the rents*, or *enjoying the use*, is liable for the tax."
>
> Code 1018.
>
> "The presidents of all the railroad companies . . . . . in this State shall be required to return on oath, annually, to the Comptroller-General, the

value of the property of their respective companies without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State. . . . . ''

Code 1032.

It will be observed that, save that their returns are made to the Comptroller, railroad companies return their property and pay taxes under the same rules as other persons. *All* the property of the companies is returned to the Comptroller, and under other provisions, may be assessed by him if not returned.

Taxes are assessed against the ''owner'', and in order to make a railroad company or any other person owe taxes, he must be an ''owner'' of property within the meaning of these laws.

The ''owner'' is not the holder necessarily of the fee. Life tenants and dowresses have always been held to owe taxes, though the fee in reversion is in another.

Section 1008 quoted above expressly recognizes that interests less than the fee are taxable.

Homestead estates in Georgia, which are mere usufructs during the life of a wife, or the minority of children (Constitution of 1877, Art. 9, Sec. 1) uniformly bear the annual taxes.

The purchaser of land, who has acquired no *title,* and mayhap has not even the equity of having paid any purchase money, may be charged by the State with taxes because he is *in possession,* and as between him and his vendor *owes* the taxes, because he is *enjoying the use* or profits. See Sec. 1018 supra.

It is apparent that *possession,* and *enjoyment of use and profits,* is very material in fixing who should pay

taxes—more important than the ownership of *the ultimate fee.* Taxes are in the nature of an *annual charge* for the privileges of protection and enjoyment of property, and ought to be paid by the "owner for the time being."

The term "owner" in another tax statute was construed by the Georgia Court as follows:

> "Any right which in law or equity amounts to ownership in the land; any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it, makes the person the owner."
>
> Mixon vs. Stanley, 100 Ga. 377, quoting
> Dubois vs. Hepburn, 10 Peters, 1.

IX. An Estate for Years is Ownership in Georgia.

Being an estate, and entitling the lessee to possession, an estate for years is within the above definition,

> "It passes as realty in this State." Code 3685.

It has been specifically held to be "ownership" in a statute providing a lien for materialmen as against the "true owner" of land:

> "The words 'true owner,' as used in Civil Code, Sec. 3352, providing for liens of materialmen against real estate, are sufficiently comprehensive to include the owner of a leasehold estate and the liens therein provided for may attach to the interest of a lessee, who has an estate for years in the demised premises subject to the conditions of the lease."
>
> The lease was for 21 years.
>
> Wilson vs. Chamberlain, 140 Ga. 593.

This is within the reason of the thing, for while the lessor gets "rent" in a sense, in the annual payments

under the lease, the amount is fixed for a long period of years, and not subject to the vicissitudes of ordinary renting. The lessee gets "the rents" of the property from year to year, in the stricter sense, he has the *use and enjoyment* of the property for the time being.

His *possession* is exclusive, save as modified by the terms of the lease:

> Southern R. R. vs. Georgia, 116 Ga. 276.
>
> "The lessee, is for the term of the lease, absolute owner of the property."
>
> South Carolina Co. vs. Augusta Southern Co., 107 Ga., p. 180, 182.
>
> "A person in possession of land and having a freehold estate therein, *or a permanent interest equivalent thereto,* has the obligation to pay taxes, and is the owner for the purpose of assessment, although his estate is less than a fee," is the text of
>
> 27 Am. and Eng. Ency. Law, 677 (2nd Ed.).

The note cites long term lease as instances of such permanent interest. A 99 year lease for all practical purposes is as valuable, and gives as complete control, as an estate for any man's life. Modern taxation is not concerned with the subtleties of feudal distinctions between estates, but with substantial conditions of ownership.

X. This Lease Creates an Estate for Years.

Estates for years and mere rentals are confused in most text books under the head of "Landlord and Tenant." They are accurately distinguished in the Georgia Code.

> "An estate for years is one which is limited in its duration to a period fixed, or which may be made fixed and certain. If it be in lands, it passes as

realty in this State. It may be for any number of years, so the limitation be within the rule against perpetuties."

Code, Sec. 3685.

"....When applied to realty, it differs from the relation of landlord and tenant in this, that in the latter the tenant has no estate, but a *mere right of use,* very similar to the *right of a hirer of personalty."*

"A tenant for years is bound for all repairs or other expense necessary for the preservation *and protection of the property."*

Code 3689.

"When one grants to another an estate for years out of his own estate, reversion to himself, it is usually termed a lease."

Code 3690.

"When the owner of real estate grants to another simply the right to possess and enjoy the use of real estate, either for a fixed time or at the will of the grantor, and the tenant accepts the grant, the relation of landlord and tenant exists between them. In such a case no estate passes out of the landlord, and the tenant has only a usufruct, *which he cannot convey* except by the landlord's consent, and *which is not subject to levy and sale;* and all renting or leasing of such real estate for a period of *time less than five years* shall be held to convey only the right to possess and enjoy such real estate, and to pass no estate out of the landlord, and to give only the usufruct, unless the contrary be agreed upon by the parties to the contract and so stated therein."

Code 3691.

"The tenant has no right beyond the use of the lands and tenements rented to him, and such privi-

leges as are necessary for the enjoyment of the use. He cannot cut or destroy growing trees, *remove permanent fixtures* or otherwise injure the property."

Code 3695.

"The landlord must keep the premises in repair, and is liable for all substantial improvements placed on them by his consent."

Code 3699.

From these quotations it appears that there are these prominent differences:

A mere tenant may not cut a tree or alter a fixture, but can only use the premises like the hirer of a vehicle or other personalty might use it. The lessee may use and alter in any way he chooses that does not injure the reversion. The tenant may not transfer his tenancy in whole or in part without his landlord's consent, which really amounts to a novation. The lessee may sell his estate at will, by his own act putting his vendee in his own place. The tenant is not bound to repair. The lessee is, and is also bound to bear the expenses necessary to the "protection" of the property. Since taxes are the price paid for the protection of government, their payment comes squarely within the letter of the duties of the lessee here prescribed. Anstell vs Brown 74 Ga. 2[illegible]

The *mode of payment* of the consideration is immaterial, whether a lump sum or in instalments of rent and is not even mentioned in the statute. Nor is the *time* conclusive, though it is very important. If less than five years, persumably a tenancy is intended. If for more than five years, clearly the presumption is of an estate.

The intention of the parties, however, is finally controlling:

Hutcheson vs. Hodnett, 115 Ga. 990.

Now if the parties use words plainly granting an estate the *incidents* of that estate will attach by implication without express mention. So if words of mere tenancy are used, its incidents will follow. Where, however, there are *many express stipulations* as to the incidents that shall follow the transaction, they will *give character* to the transaction, regardless of what the parties may *name* it. Where as here there are a multitude of stipulations, we must take words and stipulations, construe them all together, in *the light of the conduct of the parties,* arrive at their real intention.

So doing, there can be no doubt that a *lease,* an estate for ninety-nine years, was intended here and has been understood by all the parties.

The paper is headed by them "Lease": (Record, p. 8).

The grantees style themselves "Lessees." (Record, p. 84 and often).

The instrument is to Wadley *and his assigns*—express stipulation of assignability without consent, which is incompatible with a mere tenancy.

There have been such assignments, and the present lessees are such assignees—in possession by right of their assignment, and not by right of any consent of the Georgia Railroad and Banking Co. They have sub-leased to Atlanta Belt Line Company. (Record p. 85).

They have the duty to repair, and to pay the taxes, by express stipulation, which is incident to a lease but not a tenancy.

The time is almost a century.

The lessees have not used it as mere *hirers.* They have used the personalty till it is *all gone.* The realty they altered at will, removing fixtures, changing tracks and buildings, severing the portion of the realty in At-

lanta to a separate use, using it exactly as owners for the time.

One would hardly contend that the interest of these lessees, so *freely assignable* by themselves, could not be *levied on and sold* for their debts. But by express statute a tenancy could not be.

The personal property involved is not merely rented, but the stocks and bonds are "assigned." The rolling stock is not even to be itself *returned,* but is to be returned "*in* personal property *equal in value,* and as well adapted to its uses as it now is."

This is not a mere usufruct, but complete dominion for ninety-nine years, amounting to an estate.

> "It is denied by the appellants that the contract can fairly be called a lease. But we know of no element of a lease which is wanting in this instrument. 'A lease for years is a contract between lessor and lessee for possession of lands on one side, and a recompense by rent or other consideration on the other'. Bacon Abr. 632. . . . . The railroad and all its appurtenances and franchises, including the right to do the business of a railroad, and collect proper tolls, are leased to the plaintiff for a term of twenty years. In return it receives one-half of the gross earnings of the road as rent. The usual right of re-entry for failure to perform covenants, in addition to the special right to terminate the lease on notice, is found in the instrument, and the usual covenant for repairs and proper running of the road, equivalent to good husbandry on a farm, is there. The provision for *complete possession, control and use* of the property of the company and its franchises by the lessee is perfect. Nothing is left in the lessor but the right to receive rents. No power of control in the manage-

ment of the road and exercise of the franchises of the company."

Thomas vs. West Jersey R. R., 101 U. S. 71.

The Augusta Southern Railroad was incorporated under the general law for incorporating railroads, found in Acts 1881-2, page 156, which limited the charters granted thereunder to fifty years. Sec. XXI, p. 166. That railroad leased its railroad and property and privileges for the term of its corporate existence with stipulations very similar to the lease at bar.

The Georgia Court held the instrument to be a lease, saying of it:

> "It conveyed to the lessee all the property of every kind and character owned by the lessor for and during the corporate existence of the latter. When it was executed, and the lessee put in possession, the lessee became the *absolute owner* of the property for the term of the lease." (Page 180 at top.)
>
> "The lessee was, for the term of the lease, absolute owner of the property, with the right to use and operate it as it deemed best." (Page 182, near bottom.)
>
> "The instrument is what it is denominated to be, a lease, the lessor conveyed its property to the lessee, which agreed to pay rent during the term for which it held the property." (Page 181, at bottom.)
>
> South Carolina Company vs. Augusta Southern Co., 107 Ga. 164.

The Augusta Southern lease used the words, "Granted, demised, leased, and to farm let." The lease at bar uses the words "rent and farm out." They are

taken from and follow the words of the power given the company in its original charter, Sec. 12:

> "That the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons on the railroad or railroads . . . . for such term as may be agreed on."

That these words *are equivalent to "demise, lease and to farm let"* had been ruled in 1871 by the Supreme Court of Georgia, when a very broad lease in the latter words, and to last perpetually, was held authorized by language in the charter of the lessor *identical with that* in the Georgia Railroad charter and lease. It was also held that the right so to lease the "exclusive right of transportation and conveyance" carried with it the right to lease the physical properties, and the lease at bar expressly followed the logic of the ruling in so wording it.

Central Railroad Co. vs. Macon, 43 Ga. 605, 643.

That the lease at bar was not a mere rental, but a lease, a *demise,* was also ruled by the Georgia Court, which fortified its validity by reference to the Act of Dec. 18, 1835, Sec. 1, reincorporating the Georgia Company, and giving it its present name, with the power as to its property "The same to sell, grant, *demise,* alien or dispose of."

> "The word 'demise' used in the enumeration of the powers of the company under this amendment means technically '*to lease for* a term of years.' 5 Am. and Eng. Ency Law, 2nd Ed. 538. Thus by express words which do not admit of any reasonable doubt the charter of the Georgia Railroad and Banking Company clearly confers the power to *lease* its exclusive right of transportation of per-

sons or property to any person or persons or other company and for such *term* as may be agreed on."

Georgia Railroad vs. Mattox, 116 Ga. 72.

The question of estate or usufruct was squarely made and decided as follows:

> "A private corporation leased from the owners certain city lots for 21 years, agreeing to pay specified annual rentals, and after the first year, all taxes, assessments, insurance premiums, and expense for repairs, etc., etc. . . . .and at the expiration of the lease to deliver the premises in good condition to the lessors, the building then on the premises to become their property; the lessee having the right to sublet the property provided the 'business to be conducted therein be not of an objectionable character': Held, that the lessee had an estate for years in the leased premises."

Wilson vs. Chamberlain, 140 Ga. 593 (4).

As to the contrary, are cited W. and A. R. R. Co. vs. W. U. Tel. Co., 138 Ga. 430, and State vs. W. and A. R. R. Co., 136 Ga. 625, where it is said:

> "In making the lease the State reserved the right of forfeiture on broken conditions subsequent, and imposed terms and conditions indicating that no estate was intended to be conveyed to the lessee."

Such a term is the stipulation quoted, page 620:

> "That said lessee . . . . shall not sublet said road to any other company, corporation or party."

But an estate for years would be in its very nature assignable.

So too, the W. and A. lease, being a grant *by the State,* would be strictly construed in favor of the State,

and no greater interest would pass than was expressly granted:

Young vs. McKenzie, 3 Ga. 31.
McLeod vs. Burroughs, 9 Ga. 214.
Shorter vs. Smith, 9 Ga. 517.

That the Georgia Railroad and Banking Company has not been absolved by the lease from its liabilities to the public has no significance. Its liabilities would continue though it sold its road in fee simple:

Banks vs. R. R., 112 Ga. 655.
Hawkins vs. Central R. R., 119 Ga. 159.
Georgia R. R. vs. Hass, 127 Ga. 188 (5) (8).

That there are conditions on which the lease may be terminated does not affect the question:

> "It is to be assumed that the whole contract will be observed by the parties, not broken, and their true relation to the property is to be determined on that assumption."

Wells vs. Savannah, 87 Ga. 399, at bottom.

This lease, therefore, conveying *an estate* to the complainants, renders them the "owners" for the term of 99 years within the meaning of the tax statutes, and they, for that time, owe the taxes on the property, and not the lessor, who has but a reversion.

XI. Complainants Own at Least a Taxable Interest.

The complainants, under their lease, have the right to use, enjoy and control the railroad properties and franchises leased to them for the remainder of the term. They have this valuable incident, in the stipulation of the lease:

> "At the termination for any cause of *this lease*, all necessary and proper betterments which shall

have been made by the party of the second part, *or his assigns,* shall be paid for at their then value by the party of the first part."

The lessees since the lease have expended "for additions, betterments and improvements on the leased property" $6,311,363.08. (Record, p. 50). A perfectly accurate account is apparently kept of these items. Should the lease terminate at once, this would be a solvent claim. Should its payment be deferred and diminished by long continuance of the lease, the complainants have during that time the full use as owners of all the betterments, and no greater loss by deterioration than any other owner. Their betterments claim can also *be assigned* with the lease. So their investment is worth *its face value.*

The rental *is fixed.* It is not increased by these betterments. Prosperity of the business on the one hand, or accident, disaster and loss to the property on the other, is, during the term, the affair only of the lessees. They are the virtual owners of the property, being liable personally for a payment for the use of that *originally* turned over to them. For the *value* of their interest in the property as a whole, which they can freely sell on the market, they are liable for taxes. To say that six millions of dollars of taxable funds of foreign corporations, invested in Georgia by them for their own benefit and use, can be screened from equal taxation as "stock of the Georgia Railroad and Banking Company," is absurd.

The *interest* of the complainants under their lease in the leased property, as enhanced by their incidental right to reinbursement for additions and betterments, is taxable property whether it be an estate or not; and the exemption of the property of the lessor is no defense against

its taxation. Nor is the present *title* to the betterments important:

> "It is said that although lessee is bound to make improvements, he does not own them, even though their value is to be taken into consideration against him when the lease is renewed. Whether he is the owner of the improvements until he is at some time paid for them is not material upon the question of the separate interests of the lessee and the owner of the fee, the ownership of the improvements being material only upon the question of the *value* of the interest of the lessee. . . . . The value of *whatever interest he has,* is to be assessed as real estate under the statute, and that value must be determined by the assessing officer. All we can say is that it is a separate interest distinct from that of the owner of the fee, and the assessment of that interest is not an assessment upon the interest of the university and is not in violation of the exemption granted to it by the statute of 1858."
>
> Jetton vs. University of the South, 208 U. S. at page 430, ~~431~~ 150

> "To which side the artificial logic of these niceties would incline the scale is immaterial, for the solid, practical subject of taxation must be dealt with on broader principles. The value of the property consists in the use, and he who owns the use forever, though on condition subsequent, is the true owner for the time being. . . . Where taxation is ad valorem, values are the ultimate object of taxation, and they to whom the *values* belong ought to pay the taxes."
>
> Wells vs. Savannah, 87 Ga. 399, at center.

XII. Sufficient Tax Machinery Exists.

But it is urged that in the Jetton case there was a special statute to reach the lessee's interest, and no suffi-

cient legislation has been provided in Georgia. In reply we say:

Code 1008 expressly requires the return for taxation not only of "mineral and timber interests," but also of "*any other interest* or *claim in or to land* less *than the fee.*" More exhaustive words could not be devised. They cover a lease interest.

All doubt is removed by the legislation prescribing the questions to be asked to secure the disclosure of all property for taxation:

> "What is the value of your *leases,* or *leased privileges,* or other assets of like character?"
>
> Code 1087.

While these questions are prescribed for the tax receivers, they are applicable to the returns of railroad presidents who are required to make returns of all property for taxation "as other persons of the State are taxed."

I concede that ordinarily the State may have no occasion to emphasize or insist on these provisions for detailed return of interests in realty, because where all interests in it are taxed alike, it is more convenient and satisfactory to assess the entire value to the owner of one interest, whether a life tenant, dowress, holder of bond for title, lessee, or other owner, leaving them to adjust among themselves the proportion of the burden, if any adjustment is due. But *when as here,* the alleged owners are taxable *by different rules,* it is not only the right, but the duty of the tax officer to separate the taxable interests, and enforce the constitutional ad valorem taxation as far as it may be enforced, and these provisions have a peculiar application to such a situation, without involving any double taxation. Any question about their sufficiency to

reach what taxable interest the complainants have is to be resolved in favor of the State:

> "The Constitution of 1877 provides that all taxation shall be uniform upon the same class of subjects, and ad valorem upon all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. Under this Constitution the General Assembly cannot lawfully either expressly exempt from taxation or accomplish this result *by a failure to tax* any property, except that which in the Constitution itself the General Assembly is expressly authorized to exempt.
>
> "As the General Assembly has no power to exempt property from taxation by simply failing to provide proper machinery for the collection of the tax, a tax act will not be construed as failing so to provide, unless such construction is absolutely demanded by the terms of the Act."
>
> "When the tax act provides machinery ample in its nature to bring under taxation all the property of an individual, such machinery may be used to bring under taxation the property of corporations."
>
> Atlanta National Assn. vs. Stewart, 109 Ga. 80.
> And see New Orleans vs. Sempel, 175 U. S. ~~389~~, 376 quoted above.

XIII. Betterments Liable to Taxation.

In the view just urged, the leasehold interest, whatever its nature, would comprehend in its valuation all the interest of the complainants appurtenant to it. But it will now be shown that even in short term leases, and in jurisdictions where the lessee has no taxable interest, still

where he *improves the property and increases its value*, he and not the lessor owes taxes on the increased value:

> "In the absence of stipulation in the lease, the lessor is bound to pay the taxes on the property, but *not on the improvements* made by the lessee which the latter is entitled to remove or *be compensated for.*"
>
> Sech vs. Good, 19 Mo. 501.
> 24 Cyc., 1075.
> 18 Am. and Eng. Ency. Law, 651.

So the B. and O. R. R. Co. was held liable to pay taxes on the leasehold interest and improvements it had made on an exempt railroad:

> P. W. and B. R. R. vs. Baltimore, 50 Md. 397.

And the New York Elevated Railroads are taxed, though built on exempt land:

> N. Y. E. R. R. Co. vs. New York, 82 N. Y. 459.

XIV. Rolling Stock Taxable to Complainants.

The rolling stock involved, amounting to over two million dollars (Record, p. 51), is clearly the property of complainants and taxable to them. The original rolling stock of the Georgia Railroad and Banking Company was never really leased, but was of course expected to be worn out and destroyed in 99 years. So the stipulation as to it was:

> "The party of the second part also covenants for himself and his assigns to return the property hereinbefore rented, farmed out and assigned to the party of the second part *in as good condition* as it now is, and unimpaired in value, that is to say, the railroads and their appurtenances as well adapted to the purposes of transportation as they

now are, and the personal property *in* personal property equal in value, and as well adapted to its uses as it now is."

A contract to use *for consumption* personal property and to return it *in other property of equal value is a sale.*

5 Cyc. 169. See Code 3516.

The present rolling stock is entirely that bought by the lessees, and was never owned by the lessor. (Record, p. 56.) It never will be owned by it, unless the lessees at the end of the lease *will* to turn any part of it over in fulfillment of the above-quoted stipulation of the lease. In the meanwhile, the lessees use and enjoy it. If it is destroyed, they lose it. They can put it on another road if they wish. It is theirs.

The conclusion of the above-quoted paragraph of the lease is:

"And the property substituted for and added to that which is hereby rented and farmed out shall be the property of the party of the first part to the same extent as the original property for which it may be substituted or to which it may be added was the property of the party of the first part."

This is part of what is to occur *in the return* of the leased property *at the end of the lease.* The substitutions and additions *are then* to be the property of the lessor, and an excess of value is to be *paid for.* In the meanwhile, both rolling stock and other betterments and additions are the property of the lessees, whose money pays for them.

But were this stipulation construed otherwise, and to instantaneously and permanently attach to all additions and substitutions as between the parties, it would not be allowed to defeat the State in the substantial justice of its claim for taxes, for the State has never consented thereto.

XV. Stocks and Bonds are Taxable.

Bonds are expressly taxed by law: Code 1016.

Domestic stocks are not taxable, but stocks in foreign corporations are:

Wright vs. L. and N. R. R., 195 U. S. 219.

The following items of such taxable property are to be noted:

Record, p. 57, Supplement E, 15,000 shares Stock in Western of Alabama Railroad, a foreign corporation.

Record, p. 58, Supplement E, $440,900 of Certificates of Indebtedness of Atlanta and West Point R. R. These were not changed for stock till July 1, 1910, so were taxable for the year 1910.

Record, p. 58, Supplement E, $40,000 bonds of Monroe Railroad, and an unnamed sum of bonds of Union Point and White Plains Railroad.

These have all been *assigned* to the lessees, who hold the *title* to them for the time being.

The suggestion that they have no taxable situs in Georgia, because the lessees are non-resident corporations will not hold. The corporations are in Georgia *doing a quasi-partnership business there.* This property is a part of the partnership assets used in the business, and has a "business situs" in the State.

Compare:

Armour Packing Company vs. Clark, 124 Ga. 369.
Armour Packing Co. vs. Augusta, 118 Ga. 552.

XVI. Ga. R. R. and Bkg. Co. Bonds Invested.

At the Center of Record, page 49, it is stated that the Lessor raised by bonds and invested in depot at Atlanta and Round House in Augusta, $200,000, and $300,000 to

purchase steel rails, and $200,000 to re-lay the track west of Madison.

The $700,000 so invested was not "stock of the Georgia Railroad and Banking Company," though raised and spent before the lease, but was the result of the use of bonds, which this court in the case of Wright vs. Ga. R. R. and Bkg. Co., supra, was careful to observe did not then appear to have been resorted to. This money, like the $44,000 raised on new stocks in 1868, is taxable ad valorem. Of course the lessees do not owe the tax on either item, unless the leased property is taxable to them; but the status of this investment should not be lost sight of.

XVII. Athens and Augusta Terminals.

As appears Record, page 51, the lessees have spent on terminals at Augusta and Athens, about $225,000. The title to the newly acquired realty was put in the name of the lessor, evidencing a purpose to add it to the leased property as a betterment, but the money was furnished by the lessees, and charged to the account of betterments under the lease. In Athens, a mile of mainline track, and costly bridges were added. The additional freight and passenger tariffs for this mile, as well as the advantages arising from the more convenient terminals, go to the lessees. This property was not leased by the Georgia Railroad and Banking Company, it gets no rent on it, and it represents no part of the "stock of said company."

XVIII. Atlanta Joint Terminals.

It appears, Record p. 51, at bottom, that the *title* to the land embraced in the Atlanta Joint Terminal is in the complainants, except the original strip of leased property running through it. The agreement under

which this enterprise was constructed and is operated appears at Record, p. 84, and following.

It is recited therein:

> "Whereas it is deemed desirable that the lessees should *become the owners* of all improvements owned or held under lease by the Louisville Company and West Point Company, whether said property is to be utilized for the enlargement of said terminal facilities or held for future needs":
>
> 1. The lessees "hereby *appropriate, yield, devote and turn over* for the accomplishment of the purposes of this agreement," certain portions of the leased property.
>
> 2. The West Point Company agrees to "*convey to the lessees* all its right, title and interest" in certain property.
>
> 3. The Louisville Company "binds itself to *convey to the lessees* title to all property to be covered by the contemplated improvements," as described.
>
> Certain extensive, organized improvements are agreed upon, including the re-laying and re-arranging of the existing tracks.
>
> The money is to be furnished by the Louisville Co. but *to the lessees,* who bind themselves *to repay it* with a stipulated interest.
>
> The government, maintenance and income is placed under separate management from that of the general railroad business of the lessees. The lessees pay rent for the use of the terminals just as the other users do.
>
> "Taxes, State, county and municipal, and all other levies or rates lawfully imposed *upon the terminal property,* shall be *paid by the lessees;* and bills rendered to the others" in the manner that other expenses are divided.

These provisions clearly show that it was intended and accomplished that the Terminals should constitute *a unit in ownership,* and that the legal result as to taxes, *that the lessees would have to pay them,* was anticipated and provided for. This may have been for convenience, or it may have been supposed that the lessees would escape ad valorem taxes, as they have done to date.

Whatever may be true of the other portions of the leased property, that portion included in this enterprise is taxable ad valorem with the other property with which it has been commingled. It has *been severed* from the strait charter use, and made to serve the uses of others—*"appropriated, yielded, devoted and turned over"* to other purposes. The tracks are now laid without any reference to the leased property. Many of the structures, notably the large new freight warehouses, are partly on the leased property, and partly on land owned in fee by the lessees. *The whole has been organized into an industrial unit* and a separate valuation of its component parts is impracticable. Nor could the *income* of the part that is leased property be ascertained, so as to impose an *income tax.*

98 Fed. (C. C. A.) 51.

The *title* to most of it is in the lessees. They have borrowed and spent $1,500,000 of their money on it (Record, p. 51). This amount of taxable funds cannot be screened from general taxation as "stock of the Georgia Railroad and Banking Co." Had the Georgia Railroad and Banking Company itself borrowed and expended this money, its exemption would not have applied. Much less when *all the parties* to it are wholly without any exemption.

A corporation cannot extend its own exemption to cover property *not strictly* within the purposes of the charter:

37 Cyc. 911, 916.
Ordinary vs. Central Co., 40 Ga. 646.
Wright vs. Southwestern R. R., 64 Ga. 799 at top.

So the property of an exempt charity when put to other uses:

Massenburg vs. Grand Lodge, 81 Ga. 212.
Mundy vs. Van Hoose, 104 Ga. 292.

Unquestionably this Atlanta Joint Terminal is assessable ad valorem and as a whole, and is assessable to the complainants as the owners.

XIX. Practical Results.

1. The Atlanta Joint Terminals are taxable to the complainants *in solido* on an ad valorem basis.

2. As to the railroads proper, and their appurtenances, the complainants should be held the substantial owners for the time being, and liable to pay taxes to the State ad valorem, they having no contract otherwise. This view would simplify everything and eliminate all minor questions. The charter tax would be inoperative during the lease, because the lessor, as the owner of a mere reversion, would owe no taxes.

3. If this view is denied, a more complicated result follows: The complainants, as lessees of the realty, owe taxes ad valorem *on their interest* in the property, measured by the market value of their lease and improvements, additions and betterments—the sum that others would pay for the present right to occupy and enjoy the

improved property and receive pay at the end for the improvements. They also owe taxes on the personal property title to which is in them. These values might vary from year to year, and would be fixed by the machinery provided for fixing tax values.

Under this view the Georgia Railroad and Banking Company would not be entirely relieved, as a tax payer, but as a tax on *its interest* in the leased property would pay one-half per cent on the net proceeds of *its* investment of *its stock,* to-wit.: the $600,000 per year rental. It would also pay ad valorem on the value of the property represented by the $44,000 new stock, and $700,000 bonds invested in these railroads.

Complications arising from any confusion of exempt and unexempt values can be solved by fair apportionments:

Massenburg vs. Grand Lodge, 81 Ga. 212.

Respectfully submitted,
SAMUEL H. SIBLEY,
Of Counsel for Wm. A. Wright,
Comptroller-General.

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No. 162

In the Supreme Court of the United States

OCTOBER TERM, 1914

WILLIAM A. WRIGHT,
Comptroller-General of the State of Georgia, Petitioner,

vs.

LOUISVILLE & NASHVILLE R. R. CO. AND THE ATLANTIC COAST LINE R. R. CO., AND VICE VERSA.

BRIEF FOR
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL
BY
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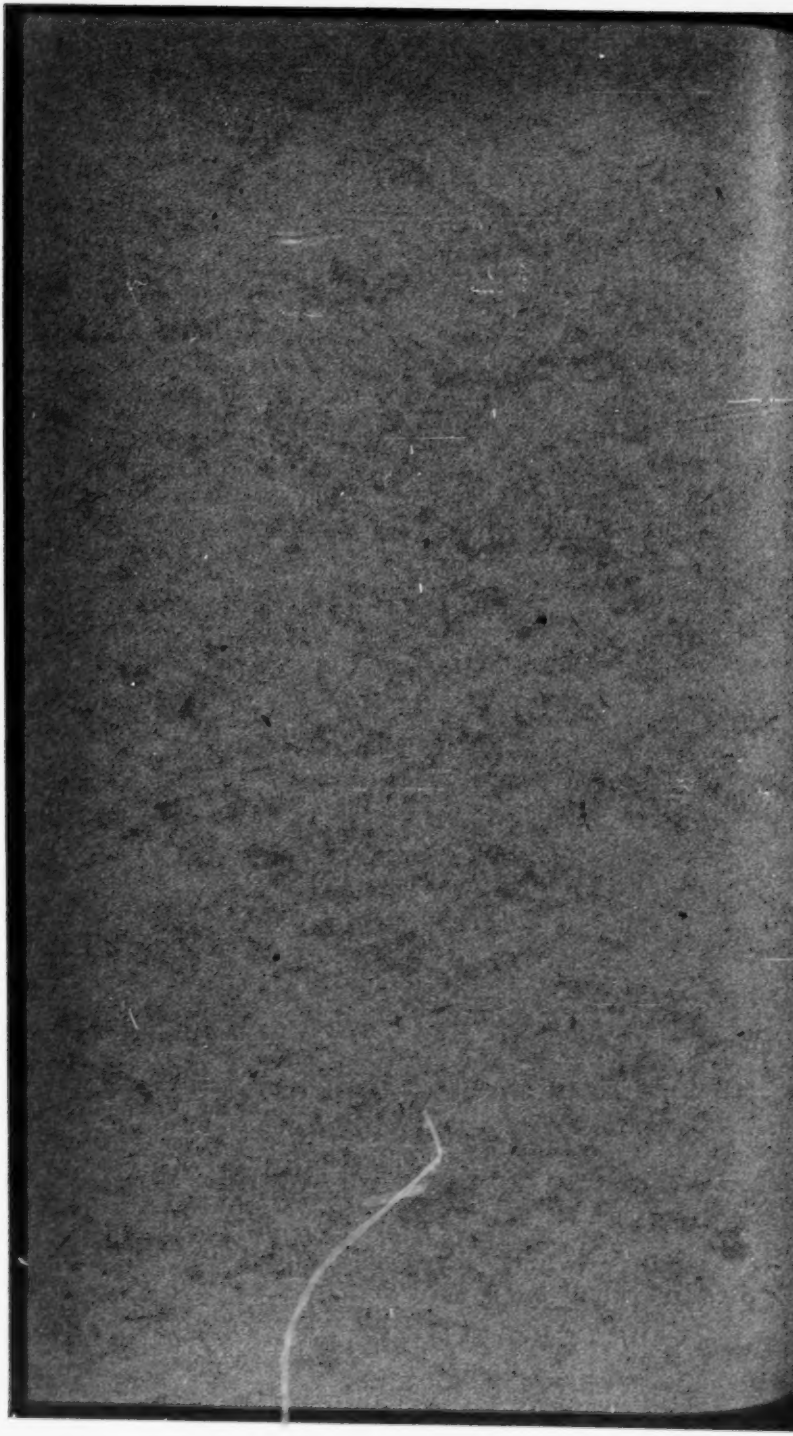

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No. 162.

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LOUISVILLE & NASHVILLE R. R. CO. AND THE ATLANTIC COAST LINE R. R. CO., AND VICE VERSA.

STATEMENT OF THE CASE.

This case involves the liability to ad valorem tax of the Louisville & Nashville R. R. Co. and the Atlantic Coast R. R. Co. as lessees of the Georgia Railroad & Banking Co. The Georgia Railroad & Banking Company was incorporated under an Act of the Legislature of Georgia, December 21, 1833, and by the 15th section of said charter it is provided: "The stock of the said company and its branches . . . . . shall be subject to a tax not exceeding one-half of one per cent. per annum on the net proceeds of their investment." The charter was afterwards amended, increasing the capital stock "to an amount *not exceeding* $4,000,000.00. Acts of General Assembly 1847, p. 197, Sec. 8.

On the 7th day of May, 1881, the Georgia Railroad & Banking Co. leased its road to Wm. M. Wadley and his

assigns, for and during the full term of 99 years, in part as follows:

> "Hath rented and farmed out to said party of the second part and his assigns, and does by these presents rent and farm out to said party of the second part and his assigns for the full term of 99 years from the 1st day of April, one thousand eight hundred and eighty-one, all its privileges, general and exclusive, of transporting persons, merchandise, produce, and every kind of property whatsoever, which is or may become the subject of railroad transportation over the lines of railroads owned or controlled by the party of the first part, to the full extent that the party of the first part has and enjoys, or is now entitled to have and enjoy, or may hereafter acquire the right to have and enjoy such privileges, and subject to all the obligations and duties imposed by its charter in this behalf upon the party of the first part."
>
> See page 8 of Record.

It is further covenanted in the lease:

> "And the party of the first part also agrees to pay the taxes which may be payable under the charter of the party for the first part, on the rental hereinafter stipulated, or on so much thereof as may be taxable, and all taxes, if any, which may become by law collectable from the party of the first part on shares of its stock in the hands of its shareholders. But all other taxes which may be payable on the property and franchises, which, or the control, use or enjoyment of which, is hereby rented, farmed out, assigned or transferred to the party of the second part and his assigns, shall be paid by the party of the second part and his assigns." See page 10 of the Record.

It is further provided:

> "The party of the second part also covenants for himself and his assigns to return the property hereinbefore rented, farmed out and assigned to the party of the second part in as good condition as it is now in and unimpaired in value, that is to say, the railroads and their appurtenances as well adapted to the business of transportation as they now are, and the personal property in personal property equal in value and as well adapted to its uses as it now is. And the property substituted for and added to that which is hereby rented and farmed out, shall be the property of the party of the first part, to the same extent as the original property, for which it may be substituted or to which it may be added, was the property of the party of the first part." See page 11 of Record.

The stocks and bonds which went with the road were "assigned and transferred to the said party of the second part and his assigns for and during the said term of ninety-nine years . . . . . with an irrevocable power of attorney to vote said stocks and bonds. . . . . ."

The lease has the usual defeasance clause for breach of covenant, and further provides: "At the termination for any cause of this lease, all necessary and proper betterments which shall have been made by the party of the second part or his assigns shall be paid for at their then fair value by the party of the first part." See page 12 of Record.

Subsequently thereafter the Louisville & Nashville R. R. Co. and the Atlantic Coast Line R. R. Co., parties to this case, hereinafter styled Lessees, "by various conveyances, contracts and judicial proceedings." . . . . . *became* and are in succession to the said William M. Wadley, the lessee of said railroad property, and are and

have been for many years operating the same under said lease." See page 2 of Record.

COMPTROLLER-GENERAL DEMANDS TAX OF LESSEES.

On the 18th day of May, 1910, William A. Wright, as Comptroller-General of the State of Georgia, demanded a return for ad valorem taxes, of the lessees of said leased property, with the appurtenances and franchises thereof, and of all property connected with or used in the operation of said railroad. See page 3 of Record.

The lessees declined to return the property or any interest therein, whereupon the Comptroller-General assessed it from the best information obtainable, notifying lessees of the assessment, advising them if dissatisfied with the assessment of their right of appeal to arbitration. Whereupon the lessees filed a bill in the Circuit Court of the United States for the Northern District of Georgia, contending that they were not liable for any taxes on the property assessed, insisting that the Georgia Railroad & Banking Co. had an inviolable charter contract with the State by which the "stock of the company" was not subject to be taxed in excess of "one-half of one per cent. on the net income of their investment"; that lessees had no taxable interest in the property, "but a mere usufruct"; that the Georgia Railroad & Banking Co. alone was responsible for the tax, and to the extent only of one-half of one per cent. on the net income, and that the charter contract was a scheme of taxation, which inhered in, and was annexed to the property. And to tax this property to lessees was in violation of the 14th Amendment to the Constitution of the United States.

DEFENDANT'S ANSWER.

The Comptroller-General of the State answered, that

the lessees did have a taxable interest in the property; that they were the substantial owners of the property for the time being, holding "an estate for years"; that the fact the original lessors had an irrepealable contract was beside the question of the lessees' liability; that the lessees had expressly agreed to pay the taxes on the property. It was denied that the taxing provision inhered in or was annexed to the property; but on the contrary was a personal privilege and not transferable. It was further insisted by the Comptroller-General that if lessees are not the substantial owners of the entire property they have a leasehold interest liable for taxation; that they had made betterments with their own unexempted funds, under the terms of the lease to be paid for by lessor at its termination; that additional investments had been made by lessees out of unexempted funds to the amount of $6,000,000.00, to the use of which they were entitled for ninety-nine years, and to payment therefor at the end of that time. That the rolling stock of the value of $2,500.00 was bought by lessees with unexempted funds, that the stocks and bonds assessed to lessees had been assigned to and vested in said lessees; that the Atlanta Terminals had been constructed by lessees with unexempted funds of their own, for which they were to be reimbursed at the end of the lease, and that this property assessed had never belonged to the Georgia Railroad, and never would unless purchased and paid for at the termination of the lease.

The answer further prayed that defendant, William A. Wright, Comptroller-General, be left free to assess and collect ad valorem taxes on the property assessed; or if all was not taxable to the Lessees, on such as was taxable.

Stipulation of Facts.

It is concluded under the stipulation of facts that lessees have spent of their own money in betterments on the leased property the sum of $6,311,363. Some of this money spent for permanent improvements lessees made from the operation of the road as net income, and other of the improvements were made from borrowed money, and Lessees are to be reimbursed therefor at the termination of the lease by lessors. On the Atlanta Joint Terminals lessees have expended $1,453,507; on the Augusta and Athens Terminals $224,343. There are other investments of like character made from borrowed money, and for which Lessees are to be paid at the termination of the lease.

Lessees hold stocks and bonds assigned by the lessor as follows: 15,000 shares of stock in the Western of Alabama, a foreign corporation; $440,000 of certificates of indebtedness of the Atlanta & West Point Railroad; that prior to the Wadley lease $700,000 of Bonds had been issued by the Georgia Railroad & Banking Company, and was invested in the lease property.

Trial of the Case.

The case was tried under the stipulation of facts (substantially as above) and the pleadings. The judge of the circuit court held that the Atlanta Joint Terminals alone was subject to ad valorem taxation; that lessees had no taxable interest in any of the other property, but a mere usufruct, non-taxable; and that the property leased, as well as the property added by lessees, although from their own private funds, was covered by the charter of the Georgia Railroad & Banking Company, and could not be taxed in excess of one-half of one per cent. on their net income.

A decree was entered enjoining the Comptroller-General from seeking to collect ad valorem taxes from lessees on every species of property assessed except the Atlanta Joint Terminals.

Appeal to the Circuit Court.

The case wes then appealed to the Circuit Court of Appeals of the 5th Circuit, which court affirmed the decree of the Circuit Court, its only opinion filed being as follows:

> "By the Court.
>
> "For the reasons given in the opinion of the trial judge found in the transcript, the decree appealed form is affirmed."

Petition for Certiorari.

Thereupon William A. Wright, Comptroller-General, filed his petition to this court for certiorari, alleging that manifest error had been committed against him in the following particulars:

First: The Court erred in adjudging and decreeing that the lease executed by the Georgia Railroad & Banking Company exhibited in the bill did not vest any estate in the lessee, but only a usufruct which is not subject to be taxed; and in not holding that said lease vested in the lessee such an estate as rendered the lessee the substantial owner for the time being of the leased property, and liable for the taxes thereon.

Second: The Court erred in not adjudging that the lessees under said lease had a valuable interest and estate in the leased property in respect of which they were taxable, even if not liable for taxes on the entire value of the leased property.

Third: The Court erred in not adjudging that the

lessees were liable for ad valorem taxes on the betterments made by them on the leased property with their own money, for which they pay no increased rental, and for which they are to be reimbursed at the end of the lease.

Fourth: The Court erred in holding that the rolling stock of the lessees is protected from ad valorem taxation by the provisions of the charter of the Georgia Railroad & Banking Co., the same having been purchased and paid for by the lessees and never having belonged to the Georgia Railroad & Banking Company.

Fifth: The Court erred in decreeing that the betterments made by the lessees on the leased property are protected from ad valorem taxation by the charter of the Georgia Railroad & Banking Company, the same having been made by the lessees with their own money, for their own use and benefit, and which they will use without rent, and for which they will be paid before surrendering them at the end of the lease.

Sixth: The Court erred in not holding that the charter contract as to taxation of the Georgia Railroad & Banking Co., was personal to that company, and that respondents could take no advantage from it.

Seventh: The Court erred in not adjudging that the Augusta Terminal, and the Athens extension and terminal are covered by said charter and not subject to ad valorem taxes, it appearing that each was constructed at the expense of the lessees, for their own use and benefit, that they pay no rent therefor, and will be compensated therefor at the termination of the lease.

Eighth: The court erred in not holding that the original leased property, in so far as it represented the investment not of the stock of the Georgia Railroad & Banking Company but the investment of its bonds, especially

seven hundred thousand dollars disclosed by the stipulation of facts to have been invested in steel rails, depots, and round-houses, was subject to ad valorem taxation.

Ninth: The Court erred in not holding the lessees liable for ad valorem taxation on the stocks and bonds assigned to them by said lease, especially the stock in the Western Railway of Alabama, which is a corporation of Alabama; the indentures of the Atlanta & West Point, and the bonds of the Monroe Railroad.

Brief of Law and Argument.

There are two main questions involved in this controversy:

First: Whether lessees under the covenants in this lease take any taxable interest in the property leased?

Second: Whether the contract in the charter of the Georgia Railroad & Banking Company, the original lessor, protects and measures lessees' liability for taxation, on the leased property, and the property added thereto by lessees?

The first question is to be determined in the light of the Georgia law; the second is ultimately a Federal question. The first pertinent inquiry therefore is, what is the nature and extent of this indenture? It was the contention of counsel for lessee that the contract gave to lessees "only a usufruct, and that no taxable estate or interest passed to Lessees. This contention was based upon, Civil Code of Georgia 1911, Sec. 3691, as follows:

> "When the owner of real estate grants to another simply the right to possess and enjoy the use of such real estate, either for a fixed time or at the will of the grantor, and the tenant accepts the grant, the relation of landlord and tenant exists between them. In such case no estate passes out of the landlord, and the tenant has only a usu-

fruct, which he cannot convey except by the landlord's consent, and which is not subject to levy and sale; and all renting or leasing of such real estate for a period of time less than five years shall be held to convey only the right to possess and enjoy such real estate, and to pass no estate out of the landlord, and to give only the usufruct, unless the contrary be agreed upon by the parties to the contract, and so stated therein."

It is respectfully and confidently asserted that this section has no application to the lease under review.

There is nothing in the lease which indicates that it was the purpose of the contracting parties that the interest of lessees was restricted to the mere right to *use*. On the contrary the language is clear and unequivocal that the interest conveyed was "to the full extent that the party of the first part has and enjoys, or is now entitled to have and enjoy, or may hereafter acquire the right to have and enjoy such privileges and subject to all the obligations and duties imposed by its charter in this behalf upon the party of the first part." (Quote from Lease). The term is for a period of ninety-nine years. The possession and control is exclusive to the party of the second part and his *assigns*. Lessees agreed to pay the taxes "which may be payable on the property and franchises . . . . . assigned or transferred," and an "irrevocable power of attorney to vote the stock transferred and assigned." The consideration is $600,000 to be paid annually. The right is reserved to enter upon and resume possession for breach of contract. It is hard to conceive of any other word which could be added to the lease contract that would make plainer the proposition that it was the purpose of the parties "to create an estate for years." "An estate for years is one which is limited in its duration to a period fixed, or which may be made

fixed and certain. If it be lands it passes as realty in this State. It may be for any number of years, so that the limitation be within the rule against perpetuities." Code of Georgia 1911, Sec. 3685. And so a lease has been defined in Georgia to be,

> "When one grants to another an estate for years out of his own estate, reversion to himself, it is usually termed a lease." Code of Georgia 1911, Sec. 3690.

For the time being therefore it is the contention of the State that lessees are the owners of "an estate for years." The lessees hold in their own right; their possession is exclusive, and they may assign, transfer, sell, or otherwise dispose of the property within the term. The very case at bar is a contradiction of the contention that only a "usufruct" passed to Wadley, the original lessee, for the case of complainant is predicated upon the proposition that Wadley had the right to *sell.*

THE LEASE CONVEYS AN ESTATE FOR YEARS.

All parties that have had to do with this railroad have treated the lease as conveying an estate for years. The lessees in this case, in the 6th paragraph of their bill recite:

> "On the 7th day of May, 1881, the Georgia Railroad & Banking Company, under authority given it in the 12th section of its original charter, *leased,* together with other property, all of the above-described railroads and their franchises and appurtenances to Wm. M. Wadley and his assigns; and by various conveyances, contracts and judicial proceedings your *orators* have become and are in succession to the said Wm. M. Wadley, the lessees of said railroad property. . . . ."

Lessees of railroads are sued in Georgia as such, and are recognized by the Code of Georgia as liable under

their contract or causes of action originating in their operation, just as the original company would be liable.

> "The lessees of any railroad, or the person or persons, or company having possession of the same, shall be liable to suit of any kind in the same court or jurisdiction as the lessors or owners of the railroad were before the lease." Code of Georgia 1911, Sec. 2799.

It is further provided by the Georgia law that lessees "whose lease is older than the judgment" could not be dispossessed on sale under execution against the lessor. Code of Georgia 1911, Sec. 6075.

The lease contract shows that it was the purpose of the Georgia Railroad & Banking Company lessor, to turn over and to completely *invest* in the lessee, Wadley and his assigns, the railroad for the term of 99 years, and to completely *divest* themselves of all interest therein except a reversion for the term of 99 years. Under the terms of this lease the Georgia Railroad & Banking Company, lessors, are no longer "doing business" in this State. 228 U. S. 295; McCoach vs. Minehill Ry. Co., citing Zonne vs. Minneapolis Syndicate, 220 U. S. 187.

The Estate for Years Taxable.

The Constitution of this State, Art. 7, Sec. 2, Par. 1, declares:

> "All taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax. . . . ." Par 4. "All laws exempting property from taxation, other than the property herein enumerated, shall be void." Par. 5. "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party."

In pursuance of these provisions the statutes of Georgia provide:

> "All real and personal estate, whether owned by individuals or corporations, resident or non-resident, is liable to taxation." Code of Georgia, 1911, Sec. 1002.
>
> "All persons owning any mineral or timber interests, or any other interest or claim in or to land less than the fee shall return the same for taxation and pay taxes on the same as on other property. . . . . "
>
> "Land and interest in land . . . . must be returned and set down in the Digest. . . . . " Code of Georgia, 1911, Sec. 1095.

The Code of Georgia, Sec. 3617, defines real estate to be:

> "Realty or real estate includes all lands and the buildings thereon, and all things permanently attached to them, or any interest therein or issuing out of or dependent thereon."
>
> "The Presidents of all railroad companies . . . . in this State shall be required to return under oath annually to the Comptroller-General the value of the property of their respective companies . . . . each class or species of property to be separately named and valued so far as may be practicable, to be taxed as other property of the people of this State."

Among the questions to be answered by the taxpayer is:

> "What is the value of your leases or leased privileges or other assets of like character?" Code of Georgia, 1911, Sec. 1087.

In the light of the foregoing citations there can be no doubt that the lease contract creates an "estate for years," and is taxable to lessees.

All Property in this State Must be Taxed Unless Exempted.

And so the Supreme Court of Georgia has well said:

> "It would be a work of supererogation at this late date to enter into a discussion or cite authorities to show that under the system of taxation prescribed by our Constitution the property of all persons and corporations, unless exempted, is not only to be taxed but must be taxed on the basis of value." Georgia Bldg. & Loan Assn. v. Savannah, 109 Ga., p. 67.

In a case where the title to land was in the city which sought to tax it, the land being held under a perpetual lease the general principles of taxation in Georgia were announced:

> "The Constitution of the State requires that taxation of property shall be ad valorem, and that when any part is taxed all shall be taxed which is subject for the time being to the taxing power in the given locality. . . . . Relative to the question of taxation it makes no substantial difference whether the estate or property of the beneficial owners be classed as realty or personalty; whatever property of either kind belongs to them is taxable ad valorem. . . . . The foundation principle of such a system is that those who own and enjoy values are to pay the taxes"; holding that a lessee in perpetuity was subject to be taxed as the beneficial owner. Wells vs. Savannah, 87 Ga. 397.

To the same effect the Supreme Court of Georgia, in Penick Sr. et al. appellant, vs. Atkinson et al., in construing the lease ruled that the lessee was chargeable with the taxes. While the facts in that case were that the lease was in perpetuity this could not alter the principle, that in every lease "creating an estate for years"

the lessee in possession is the *owner* for the time being, and liable for the taxes.

THE CONSTITUTION OF THIS STATE TAXES VALUES.

Art. 7, Sec. 2, Par. 1.

> "All taxes shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax."

In pursuance of this provision "all property or other thing of value subject to taxation must be given in by the taxpayers. . . . ." Code of Georgia, 1911, Sec. 1010.

> "All real and personal estate, whether owned by individuals or corporations, resident or non-resident, is liable for taxation." Code of Georgia, 1911, Sec. 1002.
>
> "Taxes are to be charged against the owner of property if known, and against the specific property itself if the owner is not known. Life tenants, and those who own and enjoy the property are chargeable with the tax thereon. Hence, while the public may treat property as belonging either to the maker or the holder of a bond for titles, when the latter is in possession, yet as between the parties the one receiving the rents or enjoying the use is liable for the tax." Code of Georgia, 1911, Sec. 1018.

It has never been questioned in Georgia that taxes are chargeable to the life-tenant; the doweress pays the taxes on her estate; the beneficiary of a homestead pays the taxes on the estate; all measured by the value of the property out of which the estates are carved. None of these have the fee, but are chargeable with the tax thereon because they "own and enjoy the property."

These lessees own an interest measured by the term of years (99 years), in excess of certainly the average

life. They exercise the same dominion and control over the property as a life-tenant. Lessees may again lease it, sell it within the term, and enjoy it as completely during the term—subject only to waste—as if they had the fee simple title.

The law is not much concerned with the technical niceties of title but with the broader proposition, as to who *enjoys* the value, it is concerned.

> "To which side the artificial logic of these niceties would incline the scale is immaterial, for the solid practical subject of taxation must be dealt with on broader principles. . . . Where taxation is ad valorem values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes." Wells v. Mayor & Aldermen of Savannah, 87 Ga. 399.

In the light of the foregoing citations there can be no doubt that the lease contract creates "an estate for years," and is taxable ad valorem under the laws of Georgia, unless the second contention of lessees is sound, "that the scheme of taxation inheres in the property and is annexed to it."

The Contract Relative to Taxation is a Personal Privilege.

It is conceded that the Georgia Railroad & Banking Company has by charter irrepealable contract, and as far as that road is concerned irrevocable, but it is insisted so far as the taxability of lessee is concerned it can not be invoked for lessee's benefit.

> "Although the obligations of such a contract are protected by the Federal Constitution from impairment by the State, the contract itself is not property which, as such, can be transferred by the owner, because, being personal to him with whom

it was made it is incapable of assignment. The person with whom the contract is made by the State may continue to enjoy the benefits unmolested, but there his rights end, and he cannot by any form of conveyance transmit the contract or its benefits to a successor." Rochester Ry. Co. vs. Rochester, 205 U. S. 247, citing,

Morgan v. Louisiana, 93 U. S., p. 217;
Wilson v. Gaines, 103 U. S., p. 417;
Louisville & Nashville Railroad Co. vs. Palmes, 109 U. S., p. 244;
Pickard vs. Tennessee, etc. 130 U. S., p. 637;
St. Louis, etc. Co. vs. Gill, 150 U. S., p. 649;
Norfolk & Western Railroad Co. vs. Pendleton, 156 U. S.

CONSTITUTION OF THIS STATE FORBIDS EXEMPTION.

At the time that lessee acquired this railroad the Constitution of this State, Art. 1, Sec. 2, Par. 1, declared:

"All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax. . . . .", and hence the concession was incapable of assignment.

"The authorities are numerous and conclusive that no corporation can receive by transfer from another an exemption from taxation or governmental regulation, which are inconsistent with its own charter or with the Constitution or laws of the State then applicable; and this is true even though under legislative authority the exemption is transferred by words which clearly include it."

Rochester Ry. Co. vs. Rochester, 205 U. S. p. 247;
Trask v. McGuire, 18 Wallace, 391;
Shields vs. Ohio, 95 U. S. 319;
Maine Central R. R. v. Maine, 96 U. S. 49;
Railroad Co. v. Georgia, 98 U. S. 359;
Yazoo &c. R. R. v. Adams, 180 U. S. 1;

Grand Rapids &c. R. R. v. Osborn, 193 U S. 17;
San Antonio Traction Co. v. Altgelt, 200 U. S. 304.

WHETHER THE EXEMPTION CLAIMED IS TOTAL OR A COMMUTED TAX RATE IT STANDS UPON THE SAME PRINCIPLE.

The fact that the charter contracts provided a scheme of taxation on the per cent. basis doesn't alter the principle that it is non-assignable. This feature is made clear in the case of great Northern Ry. Co. vs. Minnesota, 216 U. S., p. 207.

> "Where the Constitution of the State requires equal and uniform taxation of all real and personal property . . . . the Legislature cannot thereafter agree that the payment of a given per cent. of the earnings of a corporation . . . . . shall be in lieu of all other taxation, and such contract if attempted to be made would not be protected by the impairment of obligation clause of the Constitution of the United States. There is a difference between a contract for a commuted system of taxation on the earnings of a corporation, and a specific exemption from taxation of lands granted to the corporation for a defined period, the former is personal and not assignable, while the latter is attached to and follows the land." Great Northern Ry. Co. vs. Minnesota, 216 U. S., p. 207.
>
> "Exemption from taxation is a privilege personal in its nature; that property which has been held exempt from taxation becomes taxable when it is alienated by the owner who was entitled to hold it exempt and becomes vested in one who has no personal right to exemption." Eng. & Am. Enc. Law, Vol. 12, p. 377. See also in this connection:
>
> 35th Florida, p. 625;
> 93rd Kentucky, p. 430;
> 86th Ill., page 353.
> 106 Minn., p. 303;

76th N. J. Law, p. 627;
20th Vroom, p. 221;
50th Md., p. 397.

LESSEES CHARGEABLE WITH THE TAXES THOUGH THE FEE NON-TAXABLE.

> "The charter exemption from taxation cannot be extended simply because it would, as so construed, add value to the exemption, and an exemption from taxation of property belonging to an institution, so long as it belongs thereto, will not be extended to also exempt the leasehold interest of parties to whom the owner leases the same." Jetton v. University of the South, 208 U. S. 489.

So when a municipality leases lots belonging to it. it becomes taxable, and the taxes are chargeable to the lessee. J. W. Perry Co. v. City of Norfolk, 220 U. S. 472.

LESSEES IN THIS CASE AGREED TO PAY THE TAXES.

The lessees in the case at bar covenanted to pay the taxes in question, see Record, page 10; so that the taxes are due by lessees not alone because of the mandate of the law on the subject, but in pursuance of an express agreement by lessees.

THIS IS NOT AN EFFORT TO DOUBLE TAXATION.

The State is not trying to tax lessees ad valorem on this property and at the same time tax lessor on a per cent. basis, as provided by the charter. on the same property. The State disclaimed any such purpose in the beginning of this litigation, and now disclaims it.

It is recognized that the Georgia Railroad & Banking Company, original lessor, has an irrepealable contract with the State relative to taxation, but that contract is predicated upon the condition that that road operates its own road as its own business. The condition is, if lessor

operates the road the property shall not be liable to a tax in excess of one-half of one per cent. on its net income, provided always the stock of that company "shall not exceed $4,000,000.00." Authority is given the road to lease the property, but there is no contract that the commuted tax rate shall inhere or annex itself to the property in the hands of another. Where the owners of the road prefer to lease it rather than operate it themselves there is no contract made with the State relative to taxation. The State has made no contract that this road shall not be subject to ad valorem taxation if leased and operated by another, and the case stands just as if taxation was unmentioned in the charter.

Contracts of exemption or surrender of the taxing power of the State are to be strictly construed, and never to be extended in scope or duration beyond its express concession.

> "Where one relies upon an exemption from taxation both the power to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the public." St. Louis v. United Railways, 210 U. S. 273.

In the case at bar there is not only no language of exemption but a positive agreement on the part of lessees to pay the taxes.

It is respectfully insisted therefore that the learned judge in the court below did not on the first question involved, follow the law of the State of Georgia in holding the lessees had no taxable interest under this lease, and ruled counter to an unbroken line of decisions of this court on the second question, when he held that the limited tax rate in the charter of the lessor company could be invoked by lessees as the measure of their liability for

taxation on the property leased, including also the property added by lessees from their won unexempted funds.

Conclusion.

The contention of counsel for lessees, that assuming that they have a leasehold interest in this road which is liable for taxation, these executions should be enjoined because the Comptroller-General has demanded of them taxes on a greater interest than they are liable for, will not appeal to this court. The mistake of judgment, if it be such, on the part of the State's officer will not be attended by any such consequences. Lessees were asked by the Comptroller-General to pay taxes on this property, the lessees neglecting and refusing to make any return at all, thereby forcing the Comptroller-General to assess the property from the best information obtainable, ought not to have been taken advantage of by bill in equity; but if over-valued, by appeal to arbitration, as provided by the laws of Georgia.

The learned judge in the court below took lessees' view, and held, since there was no assessment "of any leasehold interest," the Comptroller-General and his successors were afterwards enjoined "from further enforcement of any proceedings to subject the property to ad valorem taxation." See Record, page 72.

The Final Judgment.

So the contract made with the State of Georgia and the Georgia Railroad & Banking Company, in 1833, towit: That the State of Georgia would not tax the "stock" (construed, capital) not to exceed $4,000,000, in excess of one-half of one percent on their net investments which the stockholders of that company might invest in the enterprise, is now construed by the court below as a con-

tract between the State of Georgia and to whomsoever the Georgia Railroad & Banking Comapny may assign the privilege, and without limit as to the amount of capital invested, or from whence it comes. The contract though restricted by the State to not exceed $4,000,000.00 in money, to be invested by the stockholders of the Georgia Railroad & Banking Company, is now protecting and covering $16,000,000.00 in the hands of strangers to the contract.

For the reason urged in the foregoing brief it is respectfully submitted that the judgment of the court below is wrong.

Respectfully submitted,

JOHN C. HART,
for
WM. A. WRIGHT,
Comptroller-General of Georgia.

7

BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS IN OPPOSITION

FILED

OCT 17 1914

Supreme Court of the United States

OCTOBER TERM, 1914

No. 142

WILLARD A. SMITH,
Comptroller General, etc.,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, and ATLANTIC COAST LINE RAILROAD COMPANY,
Respondents.

and

LOUISVILLE & NASHVILLE RAILROAD COMPANY, and ATLANTIC COAST LINE RAILROAD COMPANY,
Cross-Petitioners,

vs.

WILLARD A. SMITH,
Comptroller General, etc.,
Cross-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914

No. 162

WILLIAM A. WRIGHT,
COMPTROLLER GENERAL OF GEORGIA,
Petitioner,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY,
Respondents,

and

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY,
Cross-Petitioners,

versus

WILLIAM A. WRIGHT,
COMPTROLLER GENERAL OF GEORGIA,
Cross-Respondent.

Writ of Certiorari and Cross-Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS

STATEMENT OF THE CASE.

On September 24th, 1910. Louisville & Nashville Railroad Company, a corporation and citizen of Kentucky, and Atlantic Coast Line Railroad Company, a corporation and citizen of New Jersey, lessees of the Railroads

and certain property of the Georgia Railroad and Banking Company (hereinafter styled "Lessees") filed their Bill of Complaint in the Circuit (now District) Court of the United States for the Northern District of Georgia against William A. Wright, Comptroller General of Georgia, a citizen of Georgia, complaining as follows: (Transcript, pp. 2-14.)

That said Georgia Railroad and Banking Company (hereinafter styled Georgia Company) was chartered by an Act of the Georgia Legislature approved December 21st, 1833, with several amendments enacted prior to January 1st, 1863, with authority to build a road from Augusta, Georgia, to Atlanta, Georgia, and a branch to Athens, Georgia. Transcript, p. 2.)

Under an amendment approved January 21st, 1852, said Georgia Company acquired a branch railroad eighteen miles long, extending from Barnett on its main line to Washington, Georgia. (Transcript, p. 2.)

In 1879, by Legislative authority, it acquired the Macon and Augusta Railroad seventy-eight miles long, extending from Warrenton, Georgia, to Macon, Georgia.

On May 7th, 1881, under authority granted by its original charter, said Georgia Company leased all of its said railroads, with their franchises and appurtenances, and certain properties, to William M. Wadley, and his assigns, for a term of ninety-nine years from April 1st, 1881. Complainants by various conveyances, contracts and judicial proceedings have become the lessees of said railroad properties under said lease and have been so operating them for many years. (Transcript, p. 2.)
A copy of said lease to Wadley is Exhibit A of the Bill. (Transcript, pp. 8-13.)

Under Section fifteen of the Charter of the Georgia Company its said railroads from Augusta to Atlanta and

said branch to Athens, their appurtenances and franchises, are exempt from all taxation except a tax of one-half of one per cent on the net earnings of said designated railroads.

Such tax is payable to the State of Georgia and has been continuously so paid by said Georgia Company every year, since it became incorporated under said charter, until and including the year 1909. (Transcript, p. 3.)

From the years 1903 to 1910 said defendant Wright as such Comptroller General, sought to compel said Georgia Company to pay taxes on all of the said railroads to the State of Georgia and to the Counties, Municipalities and School Districts on the line of said railroads. (Transcript, p. 3.)

The Supreme Court of the United States having held said railroads were not subject to **ad valorem** taxes, including a so-called "franchise" tax, and that the Legislation of Georgia, so far as it sought to impose any such taxes on said Georgia Company, was unconstitutional, null and void, said defendant, having failed in his effort to so tax said Company, is seeking to levy the same taxes on the same property against complainants as tenants of the owner: i. e., as lessees of said Georgia Company. (Transcript, p. 3.)

During the time in 1910 fixed by law for making tax returns by Railroad Corporations, said Georgia Company tendered to the Comptroller General a Tax Return of its Railroads and other properties. As to all of its Railroads and appurtenances, except the Macon and Augusta Railroad and Washington Branch Railroad, its return was based on its charter provision providing that the taxes thereon should not exceed one-half of one per cent on the net income of its investments. The Macon and Augusta Railroad and Washington Branch Railroad it returned for **ad valorem** taxation. (Transcript, p. 3.)

The Comptroller General, on May 18th, 1910, demanded that the complainants as Lessees of the Georgia Company do return its properties. They declined to do so on the ground of the special scheme of taxation aforesaid, which had been sustained by the United States Supreme Court, and which relieved its property, except the Washington Branch, and Macon and Augusta Railroad and appurtenances, from other taxation: that complainants as tenants were not liable for taxes on the leased property; that the Georgia Company was the proper party to return and pay all taxes on **all** property, the title to which was in said Georgia Company; that the State of Georgia had no legal right to demand either the return, or payment, of taxes from the Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, as Lessees, of said Georgia Company. They had been informed of the return made by the Georgia Company. (Transcript, pp. 3, 4.)

The Comptroller General, on July 26th, 1910, assessed to these complainants, as the parties operating under lease from said Georgia Company, the Railroad known as the Georgia Railroad, with the appurtenances and franchises thereof and all property connected with, or used in, the operation of said Railroad, under the following divisions:

The Railroad from Barnett to Washington.

The Railroad from Union Point to Athens.

The Railroad from Augusta to Atlanta, (exclusive of Terminals).

Rolling stock and other property used in connection therewith, including stocks and bonds leased.

Tracks and buildings and other property known as Atlanta Terminals.

Tracks, buildings and other property known as Augusta Terminals.

A copy of said assessment is Exhibit B of said Bill. (Transcript, pp. 4, 14.)

Complainants deny that they have any such right, title or interest in the property assessed as makes them liable for the taxes thereon. They aver that the property belongs solely to the Georgia Company, which has never parted with its right, title or estate therein, and which alone is liable for taxes thereon. Complainants are merely tenants for a term of years, which may, in certain contingencies, expressly provided in the lease, terminate at any time prior to the end of the term named. (Transcript, pp. 4, 5.)

The Georgia Company has always recognized its obligation to pay the taxes on the railroads and property rented to complainants, and, during the twenty-nine years of the lease prior to 1910, the State has recognized this status and collected said taxes from said Georgia Company, and the defendant has accepted for this year 1910 (for which he now demands that said lessees make the return of said railroads, etc.), and has received, the return of the Macon and Augusta Railroad from said Georgia Company and will in due time collect the tax on said Macon and Augusta Railroad from said Georgia Company. (Transcript, p. 5.)

It is averred that this property is not exempt from taxation, but is taxable under the charter provision by a tax of one-half of one per cent on its net earnings. That this was not a personal privilege; but a scheme of taxation inhering in this particular property and annexed to it.

That this property has remained, and still is, the property of the Georgia Company alone, and it is alone liable for its taxes. (Transcript, p. 5.)

There is no law in Georgia for passing over the owner of property and taxing his renter. (Transcript, p. 6.)

Taxes on property are never charged to renters, tenants or lessees in Georgia, and if complainants are now

taxed, as defendant is attempting, they will be denied the equal protection of the laws, and their property will be taken without due process of law, all in violation of the Fourteenth Amendment of the Constitution of the United States. (Transcript, p. 7.)

Complainants are remediless at law and defendant will collect the tax unless restrained.

They pray that it be adjudged:

First: That Complainants are not liable for any of the taxes assessed by Exhibit B.

Second: That Defendant be enjoined from further charging complainants therewith, or issuing any execution therefor.

Third: For general relief and for subpoena directed to defendant Wright. (Transcript, p. 7.)

The defendant answered the Bill of Complaint; admitted the chartering of the Georgia Company as alleged, its ownership of the railroads, franchises and property as alleged, and the existence of its special scheme of taxation; also the execution of the lease to Wadley and assigns, and the operation of the railroads of the Georgia Company by complainants.

He admitted that as Comptroller General he refused to receive taxes for the year 1910 from the Georgia Company on its railroads (other than Washington Branch and Macon and Augusta Railroad) and claimed that the lessees must return said property and pay all taxes thereon. (Transcript, p. 15.)

He admitted the efforts from 1903 to collect **ad valorem** taxes from the Georgia Company, and that the Supreme Court of the United States had sustained said Georgia Company's charter scheme of taxation, but insisted that

the question of the lessees' liability for such taxes was never considered or decided therein. (Transcript, p. 16.)

He averred that prior to May 1st, 1910, the date fixed by law for tax returns of Railroad Companies to be made, he notified the Georgia Company and the lessees that the latter would be expected and required to make returns of the railroads operated by them under said lease with other property used in connection therewith. That said lessees having made no return as requested, defendant on May 18th, 1910, made a formal demand for a return in twenty days of said railroads so leased and of all property connected with, or used in the operation of said railroads, which complainants refused to make. (Transcript, p. 16.)

Upon such refusal defendant assessed for taxation said railroads so operated by said lessees with their franchises and rolling stock and other personal property used in connection therewith, and the Terminals at Atlanta and Augusta, at an aggregate valuation of about Sixteen Million Dollars, as shown by Exhibit B of the petition, the Macon and Augusta Railroad not being included thereunder, and notified respondents of such assessment and of their right to an arbitration if dissatisfied. (Transcript, pp. 16, 17.)

Defendant admitted that the Georgia Company in leasing its railroads did not relieve itself from any liability, arising to anyone from their use by the lessees, but denied that this legal proposition has any bearing upon the lessees' liability for taxes. Defendant also denied that the Georgia Company parted with no title or estate, but averred that it created an estate in realty, differing from a tenancy, and that it has retained to itself a mere estate in reversion. (Transcript, p. 17.)

He denied that he intended collecting taxes on the Macon and Augusta Railroad from both the Georgia Com-

pany and lessees. As there is no dispute as to the taxability of that railroad ad valorem, it is immaterial to the State which Company pays them. (Transcript, p. 17.)

Respondent insisted that the partial exemption from taxation contained in the charter of the Georgia Company was personal to that Company alone, regulating the taxation of its railroads only to the extent that they represented the investments of its stock, and while possessed and operated by that Company, and did not regulate the taxation of said property in hands of other persons, and that the lessees are in effect the owners of the estate in possession and are liable for full, ad valorem taxes on said railroads. (Transcript, pp. 17, 18.)

He insisted that the parties to the lease recognized that the lessees are liable to pay taxes on the property leased, and contracted therefor. (Transcript, p. 18.)

He also insisted that the lessees should be treated as the owners for the purpose of taxation, and should pay ad valorem taxes as any other owner. (Transcript, pp. 18, 19.)

By amended answer the defendant, Comptroller General, set up that the railroads sought to be taxed should be classified as follows:

(a) The original railroad, property and franchises of the Georgia Company in the condition in which the same were delivered to the lessees in 1881.

(b) The additions and betterments and improvements of said property made by the lessees since said lease.

(c) The Augusta Terminals constructed principally by the lessees.

(d) The Atlanta Terminals constructed principally by the lessees and used by them in connection with said

railroads and also in connection with other railroads, and for other purposes.

(e) Rolling stock purchased by the lessees with their funds, greatly in excess of that received from the Georgia Company.

(a) As to Class (a), defendant alleged that the Georgia Company prior to the lease raised Two Million Five Hundred Thousand ($2,500,000.00) Dollars from bonds which are invested in its railroad property; that its special form of taxation does not cover this investment and that it is taxable ad valorem thereon.

That as to its railroads representing its stock, the lessees are vested with an estate for ninety-nine years, of greater value than the reversion, and are in possession: and they are taxable ad valorem on the entire value of the entire fee; but in any event on the value of said leasehold estate. (Transcript, pp. 19, 20.)

(b) As to Class (b), defendant averred that at the time of said lease the railroads leased were poorly equipped, laid with light iron rail, unballasted, with insufficient depots and terminals.

That the main tracks have been laid with steel rail of nearly double weight, the track ballasted, and four steel bridges replace wooden ones. The funds of the lessees have made these improvements for the benefit of the leasehold estate. No increased rental is paid the Georgia Company because of these improvements. If they remain at the end of the lease the Georgia Company must pay for them.

These increased values, defendant insisted, amount to Four Million ($4,000,000.00) Dollars, and taxes thereon should be paid by the lessees. (Transcript, pp. 20, 21.)

(c) As to Class (c), defendant averred that the lessees have purchased, since the lease, lands, additional to

those leased; have laid out on them, and the leased lands extensive track yards and built thereon many tracks; also a freight depot and an office building. The entire value of these additions and improvements are Three Hundred and Twenty-five Thousand ($325,000.00) Dollars. This investment represents funds of the lessees and not stock of the Georgia Company. No additional rent is paid because of these improvements; the lessees get the benefit thereof; the Georgia Company must pay for them at the end of the lease.

Defendant insisted they are taxable ad valorem to the lessees. (Transcript, p. 21.)

(d) As to Class (d), defendant averred that the lessees have erected partly on land leased from the Georgia Company, and partly on land acquired by said lessees, from the Atlanta and West Point Railroad Company (hereinafter called West Point Company), and from the Louisville and Nashville Rairoad Company (hereinafter called called the Louisville Company) what are called the Atlanta Joint Terminals. Said lessees have erected thereon, with money borrowed by them, a system of tracks, freight depots, round houses, repair shops, coaling stations and other terminal facilities. These are used jointly by said lessees, by the West Point Company and by the Louisville Company, who pay interest on the investment, taxes and expenses of all sorts pro rata according to use. Funds of the Louisville Company aggregating about Two Million Dollars ($2,000,000.00) were expended in creating the same. (Transcript, pp. 21, 22. 31, 32, 33, 34.)

They are managed by said lessees, said West Point Company and said Louisville Company, jointly through a Board of Control, composed of their respective general managers. (Transcript, p. 33.)

"The terminals are to all intents and purposes a separate partnership enterprise." (Transcript, p. 33.)

Some of the space in buildings is rented out to wholesale grocery merchants and others for purposes of trade. (Transcript, p. 33.)

Defendant insisted said lessees are liable for the taxes assessed by him on the Atlanta Joint Terminals. (Transcript, pp. 21, 22, 34.)

Defendant also averred that the lessees in 1882 extended the Athens branch from the then terminus, east of the Oconee River. one mile. into the City of Athens, and acquired the necessary lands and built the necessary terminals therefor at a cost of Three Hundred Thousand ($300,000.00) Dollars. The title was taken in the name of the Georgia Company, but the funds were furnished by the lessees. Such extension and property represent taxable funds of the lessees and they are taxable thereon. (Transcript, pp. 34, 35.)

(e) As to Class (e), defendant averred that the lessees have bought rolling stock with their own funds which is not an investment of the "stock" of the Georgia Company and on which lessees should pay taxes. (Transcript, pp. 21, 22.)

Exceptions were filed to the answer. Thereafter it was amended, and exceptions to such answer as amended were filed. These exceptions were overruled. (Transcript, pp. 36, 47.)

The point raised by these exceptions was that the averments as to the Atlanta Joint Terminals and the effort to include them in an assessment of the Georgia Railroad and appurtenances and rented property as against the lessees, under the assessment Exhibit B of said Bill of Complaint, were irrelevant to the case made by the Bill of Complaint.

That said properties were not subject to be assessed with, and as a part of, an assessment of the properties

embraced in the general description of the Georgia Railroad. (Transcript, pp. 36, 40.)

A statement of facts was agreed to by the parties. (Transcript, pp. 47, 61.)

A part of said agreed statement is the agreement under which the Atlanta Joint Terminals were created and are operated. (Transcript, pp. 52, 84, 96.)

The agreed facts show as to the investment of the Two Million, Five Hundred Thousand ($2,500,000.00) Dollars of Bonds, (Amended Answer (a), that the proceeds of these Two Million, Five Hundred Thousand ($2,500.000.-00) Dollars of Bonds went, to the extent of Six Hundred and Forty-nine Thousand, Eight Hundred and Thirty-seven and 34/100 ($649,837.34) Dollars, into the Port Royal and Augusta Railroad, and were a total loss.

Seven Hundred and Eighty-Eight Thousand. Nine Hundred and Forty and 12/100 ($788,940.12) Dollars now exist in fifteen thousand (15,000) shares of capital stock of Western Railway of Alabama.

The Macon and Augusta Railroad absorbed Nine Hundred and Ninety-Four Thousand Three Hundred and Seven and 6/100 ($994,307.06) Dollars. (Transcript, pp. 47, 48.)

The Macon and Augusta Railroad is not included in the Comptroller's assessment, and his answer admits the State has collected her full claim of taxes as to it. (Transcript, pp. 16, 17, paragraphs 12 and 16.)

These three sums, Nine Hundred and Ninety-Four Thousand, Three Hundred and Seven and 6/100 ($994,-307.06) Dollars; Seven Hundred and Eighty-Eight Thousand, Nine Hundred and Forty and 12/100 ($788,940.12) Dollars; and Six Hundred and Forty-Nine Thousand, Eight Hundred and Thirty-Seven and 84/100 ($649,837,-84) Dollars, aggregate Two Million, Four Hundred and

Thirty-Three Thousand and Eighty-Five and 2/100 ($2,433,085.02) Dollars. (Transcript, p. 48.)

It is evident that the defendant has not proven his affirmative allegation that the proceeds of these Two Million, Five Hundred Thousand ($2,500,000.00) Dollars of bonds went into the railroads and equipment of the Georgia Company.

For a detailed history of these bonds and their issuance, see (Transcript, pp. 55, 56.)

The agreed statement of facts shows the expenditures made on the road. (Transcript, pp. 49, 52.)

Excluding the cost of the Washington Branch and the Macon and Augusta Railroad, on both of which ad valorem taxes are paid, there has been spent since 1853, the time when the Railroad was completed, up to the lease, twenty-eight years, about Four Million, Two Hundred Thousand ($4,200,000.00) Dollars, derived almost entirely from earnings. This is about One Hundred and Fifty Thousand ($150,000.00) Dollars per annum and includes expenditures for rolling stock. (Transcript, pp. 49, 50.)

Since the lease, thirty years, the lessees have expended for keeping up the leased property out of the net income of such property Four Million, Six Hundred and Thirty-Three Thousand, Five Hundred and Twelve and 77/100 ($4,633,512.77) Dollars. This is One Hundred Fifty-Four Thousand, Four Hundred and Fifty and 42/100 ($154,450.42) Dollars per annum on three hundred and eight miles of road, or about Five Hundred ($500.00) Dollars per mile. (Transcript, p. 51.)

The title to all of this property involved, except a part of the Atlanta Terminals, is in the Georgia Company. (Transcript, p. 51.)

All of the expenditures except this last, are within the

territorial and topographical limits prescribed by the Georgia Company's charter, and have been made for the conservation and improvement of its roads. (Transcript, p. 52.)

The rolling stock on hand at the date of lease aggregated eight hundred and sixty-five (865) cars of all sorts. The locomotives, forty (40). (Transcript, p. 52.)

The rolling stock on hand now (September 7th, 1911,) aggregates nineteen hundred and eighty-three (1983) cars and eighty-three (83) locomotives. The title to these engines and cars, lessees insist is in the Georgia Company. Defendant contends to the contrary.

These additions to rolling stock have been made by the lessees in good faith in the belief that they were rendered necessary by the increased business of the leased roads. (Transcript, pp. 52, 53, 54.)

This business has increased from Tons of Freight carried, Three Hundred and Forty-Four Thousand. Five Hundred and Seventy-Nine (344,579),—and Ton Mileage. Forty-Five Million, Seven Hundred and Five Thousand and Seventy-Four (45,705,074), in year ending March 31st, 1882, to Tons of Freight Carried, One Million, Eight Hundred and Forty-Three Thousand, Two Hundred and Twenty-Two (1,843,222). and Ton Mileage, Two Hundred and Seven Million, Nine Hundred and Forty-Three Thousand, Three Hundred and Thirty-Seven (207,943,337), in year ending June 30th, 1911,—and from Passengers carried in said year ending March 31st, 1882, Two Hundred and Ninety-Seven Thousand and Twenty-Two (297,022),—Passenger Mileage, Twelve Million, Five Hundred and Ninety-One Thousand. Three Hundred and Three (12,591,303),—to Passengers for year ending June 30th, 1911, One Million, Two Hundred and Seventy-Eight Thousand, Nine Hundred and Thirty-Four (1,278,934), Passenger Mileage Forty-One Million, One Hundred and Sixty-Eight Thousand, and Ninety-One (41,168,091).

Other railroads in Georgia have made proportionate increases in like facilities. (Transcript, pp. 78, 81, 58, 60.)

Since the lease, the Georgia Company has returned annually the net earnings of its chartered property, not the rental, for taxation and has paid to the State one-half of one per cent on such net earnings. In some years the earnings have exceeded the rental, in others, they have been less. (Transcript, pp. 55, 60.)

The Georgia Company has paid taxes to the defendant to date on the assessments of the Macon and Augusta Railroad and Washington Branch, but the taxes of 1910 were paid under stipulation, that the receipt of the taxes by defendant from the Georgia Company was not to estop him from claiming that these taxes were legally due from said lessees. (Transcript, p. 55.)

For a tabulated statement of the net income and taxes paid thereon from 1881 to 1911, inclusive, see (Transcript, p. 60).

The case came on to be finally heard on the pleadings and agreed statement of facts.

The Court rendered an opinion in which it was held that under the law of Georgia the Lease Contract created an usufruct and not an estate for years.

That the lessor, the Georgia Company, and not the lessee, was liable to the State for all taxes on the property rented and its accretions and accessions, and that as to such, except the Macon and Augusta Railroad and Washington Branch, the tax of one-half of one per cent. on the net income was the measure of taxation. That all property involved in the suit was such rented property, or accretions and accessions, except the Atlanta Joint Terminals. That as to that, a part might be a mere betterment of the old property and not subject to ad valorem taxation against the lessees, but what that might be the

Court could not at the time determine from the facts before him. (Transcript, pp. 61-71.)

A final decree was taken perpetually enjoining the enforcement of the defendant's assessment, except as to the Atlanta Joint Terminals. As to the assessment of, and collection of taxes thereunder on these, the injunction was denied. (Transcript, pp. 71, 72.)

The defendant Wright presented his petition for appeal from all parts of the decree except that relating to the Atlanta Terminals. (Transcript, p. 72.)

This appeal was duly perfected. (Transcript. pp. 73-75.)

The complainants thereupon presented their petition for a cross appeal from so much of said final decree as held that said Atlanta Joint Terminals were subject to be taxed under the assessment sought to be enjoined in this case, and which denied the injunction restraining the defendant from proceeding to collect the taxes thereon, levied under said assessment. (Transcript, pp. 76-82.)

ERRORS ASSIGNED ON CROSS APPEAL.

They alleged that the Court erred as follows:

1. In not sustaining complainant's exceptions to the amendment of defendant's answer of July 5th, 1911, which set up the creation of said Terminals, by the joint agreement (Transcript, pp. 84-96). It is not responsive to the Bill of Complaint, nor does it designate any property taxed other than that acquired under the lease from the Georgia Company. (Transcript, pp. 36, 77.)

2. In not sustaining Exception Three to that part of said amendment of said answer which set up that prior to April 1, 1907, the lessees and the Atlanta and West

Point Railroad Company and the Louisville and Nashville Railroad Company entered into an agreement in writing to unite certain property within certain limits as a Joint Terminal; that the lessees turned in certain of the leased property, The West Point Company, certain of its Terminal property, and the Louisville Company, certain adjoining property to create a joint terminal, and large moneys were expended thereon, furnished by the Louisville Company, the title to rest in these complainants until April, 1980, but to be jointly controlled by all of the parties. This part of said amended answer was excepted to as irrelevant to the questions made by the bill of complaint and if relevant, only proper in a cross bill and too indefinite in averment. (Transcript, pp. 36, 37, 77.)

3. In not sustaining the fourth exception to that part of said amendment of said answer which averred that the most valuable part of the erections were on the lands deeded from the West Point Company and Louisville Company, but the whole was intended to be one industrial unit and derived its value largely from the connection of all parts with the whole and its adaptation to use as a joint terminal for all of said railroads.

The same grounds of exception, stated in assignment of error two, above, were repeated to this part of said answer. (Transcript, pp. 37, 38, 77, 78.)

4. In not sustaining the fifth exception to that part of said amendment of said answer which averred that this joint terminal was controlled by the joint users by a Board composed of their several general managers; that they contributed, in proportion to use, to paying all expenses of every character, including taxes due thereon. "Said terminals are to all intents and purposes a separate partnership enterprise." Also that the Board of Control rented out parts of the building thereon to wholesale grocery merchants and others.

The same grounds of exception as those under assignment of error two are repeated. (Transcript, pp. 38, 78.)

The theory of these exceptions and of the assignments of error to the action of the Court in overruling the same is: That the Comptroller General was proceeding to assess and tax the lessees of the Georgia Company in the place and stead of that Company as being liable for ad valorem taxes for which it would have been liable had no lease existed and had it possessed no special charter provision for taxation, claiming

1st. That the lease vested the property in the lessees stripped of this special method of taxation.

2nd. That the lessees were **using under the lease in its operation property** which if the Georgia Company were operating the property would be subject to **ad valorem** taxes.

To that end he assessed the property, dividing it into several parcels, and assessing each parcel as a part of the leased property against the lessees. It is no where pretended that the Atlantic Coast Line Railroad Company has any interest whatever except as a lessee of the Georgia Company. This attempt to reach property embraced in the Atlanta Terminals, outside of the part received from the Georgia Company, and to assess taxes against it, because **not** a part of the leased property, is wholly foreign to the Comptroller's assessment, or his claim of right to tax these complainants as lessees of the Georgia Company.

5. Because the Court decreed that the Atlanta Joint Terminals as assessed by the respondent, as shown in said bill of complaint, were subject to ad valorem taxation, it appearing from the agreed statement of facts, and the exhibit thereto, that a large part of said Atlanta Joint Terminals consisted of property received and held by the said complainants under the lease of the Georgia

Railroad and Banking Company to Wm. A. Wadley, and as to which the said complainants hold only an usufruct.

(a) Because said property in this assignment of error just mentioned, received under said lease, formed an integral and essential part of said Atlanta Joint Terminals, as shown by the pleadings, and agreed statement of facts in said case; that the said assessment of the said comptroller included as an integral and essential part thereof such property, which was not subject to ad valorem taxation and its presence in said assessment vitiated the entire assessment of said Atlanta Joint Terminals.

(b) Because under the facts of said case the assessment of said Atlanta Joint Terminals as made by the Comptroller General, as against these respondents, under a demand for a return of the properties known as the Georgia Railroad, operated by them. was illegal, without authority of law, and should be enjoined.

6. The Court erred in not enjoining said assessment of said Atlanta Joint Terminals for each of the reasons assigned in the last above assignment of error.

7. The Court erred in holding in this case that said Atlanta Joint Terminals were liable to ad valorem taxation, as against these respondents, under the assessment of the said Comptroller General sought to be enjoined.

(a) Because the demand for return made upon these respondents and the assessment made against them, as appears in the record in this case, were solely as lessees of the Georgia Railroad and Banking Company, on the ground that they, as such lessees, were bound to return its property for taxation and to pay ad valorem taxes upon the whole thereof; that these respondents as such lessees of said Georgia Railroad were not liable to be taxed on, or to have assessed against them for taxation, any of the said property held by them as lessees of the Georgia Railroad under said lease.

(b) Because any decree seeking to tax property other than that held by these respondents as such lessees is not germane to the demand for taxes made, and is not properly embraced in the assessment attempted to be made against these respondents, jointly, as such lessees.

8. It appears from the facts of said case that they, as lessees, have no such interest or estate in any of the property involved in said Atlanta Joint Terminals as renders the same subject to taxation against them, but that under the laws of Georgia governing taxation the same should be assessed for taxation against the respective owners thereof, each and all of whom it appears are taxpayers of the State of Georgia, and against whom taxes can be levied and collected if due. (Transcript, pp. 78, 79.)

The United States Circuit Court of Appeals for the Fifth Circuit affirmed the decree of the Circuit Court for the Northern District of Georgia, the only opinion filed being as follows:

> "By the Court: For the reasons given in the opin-
> "ion of the trial judge found in the transcript, the
> "decree appealed from is affirmed."

On May 5, 1913, a petition for certiorari was presented to this Honorable Court by William A. Wright, Comptroller General, and upon May the 12th, 1913, the Writ was ordered to issue. The Louisville and Nashville Railroad Company and the Atlantic Coast Line Company, Respondents in said Writ, thereupon presented a cross petition for Writ of Certiorari to bring to this Court for review the errors assigned by them on their cross appeal to the United States Circuit Court of Appeals in said case.

The Court granted the petition, and on the said writs of certiorari thus granted, the entire record has been brought to this Court both on the appeal and cross appeal. (Transcript, pp. 101-103.)

BRIEF OF LAW

A.

ON THE APPEAL.

I.

The Questions in the Case.

The main question in this case is not whether there is property outside of the special scheme of taxation of the Georgia Railroad and Banking Company's Charter. or whether the Complainants themselves have **special interests** liable to be taxed; but whether **the complainants, and not the Georgia Railroad and Banking Company** are liable for the taxes due on the property, the **fee simple** title to which in law and equity, is in the Georgia Railroad and Banking Company; or must the Comptroller General let that Company return its property and adjust the taxes thereon with it under the law applicable thereto.

In subordination to this main question we insist:

1st. That under the Common Law, a landlord, or the owner of the fee, where there is an estate for years, pays the taxes **on the entire property and interests therein.**

2nd. That where this law has not been changed, to tax the owner on the full assessment, and tax the lessee on his interest, which is included therein, or **vice versa,** is double taxation and illegal.

3rd. That it is only by express statute that a lessee is

taxed upon his leasehold interest as a separate thing, and, in that event, the owner only pays on the value remaining after deducting the lessee's assessment.

4th. That there is no law in Georgia for so dividing an estate, where the right claimed by each party extends to the **whole** property, and is only a succession of terms of enjoyment. That in such case **one** or **the other,** pays the whole tax, e. g., a life tenant, who pays **all** taxes; or the holder of a bond for title, (these estates are, either in law or equity, **freehold** estates); or in case of a lease, the owner of the fee. (Here the lessor's estate is the freehold, and the lessee's a chattel real.)

Respondent concedes this to be true in the case of an usufruct tenancy, however valuable, and this confession destroys his argument, that every **interest** of pecuniary value is taxed **to the holder thereof.**

5th. That the Statutes of Georgia recognize this method of taxation in such cases.

6th. That it is only where interests have been divided, so that partial ownership by one and his assigns is exclusive of the subject matter owned, for **all** time, and really divides the elements of value in the property, as where one owns the mineral interest and another the agricultural, each being divested of all interest in that element owned by the other, that each pay taxes.

7th. That in the present case this lease is an usufruct.

8th. That if the **law** did not place the burden of taxes and repairs on the landlord it would have been useless to contract, as here done, for the payment thereof by the tenant in part.

9th. That such covenants create no obligation to, or

right in, the State, nor can the State proceed against the party so contracting, by its assessment and summary process.

That it is merely a part of the rent so to be applied, and pays the landlord's debt.

10th. That even if this lease created an estate for years, as opposed to an usufruct, it would still leave the landlord liable for the entire taxes due on the property.

11th. That this method of taxation does not exempt any property. It is a mere method of collecting the taxes due on the property by requiring that the person who stands in a certain relation to it shall owe and pay what is due from the **entire** interest therein.

Thus the life tenant pays the taxes on the life estate, and on the remainder or reversion; also he receives the entire issues and profits of the estate. So too the party in possession under a bond for title. But the lessor is re-receiving the **rents** of his estate and is bound for its taxes. He has the ability, through fixing the amount of rent in gross, or by making the lessee pay as additional rent a sum equal expressly to the taxes, to reimburse himself.

12th. That the property added to the Georgia Railroad and to which, under the lease, the lessor takes title, is protected by its charter scheme of taxation.

13th. That this scheme is not a provision how the Georgia Railroad & Banking Company should be taxed, but how **the property** intended to be described by Section Fifteen of its Charter is to be taxed.

14th. That this embraces all accretions necessary to meet increasing business and improved maintenance, required to keep pace with its present duty to the public.

15th. That the agreed statement of facts shows that no betterment, the title to which has gone into the Geor-

gia Railroad and Banking Company, exceeds its present needs and duties under its increased business.

16th. There is no suggestion that the extensions at Augusta or Athens, or improvements of track, or rolling stock, are not now needed.

17th. The joint arrangement at Atlanta is in harmony with the State Law permitting roads to use terminals jointly, and increases the efficiency of the Georgia Railroad and Banking Company in transacting business with the public.

18th. The properties outside of those owned by the Georgia Railroad and Banking Company are conveyed to these complainants, **not** under the lease, but under a separate tripartite agreement. It vests them with these properties only for a limited time. Makes them mere agents of the real owners, not more than lessees, and leaves all property, not owned by the Georgia Railroad and Banking Company, taxable to the party who contributed it, i. e., to the Atlanta & West Point Railroad Company **as owner** in respect to the property it brings in, and to the Louisville & Nashville Railroad Company, **as owner,** in respect to the property it brings in.

None of it is taxable to these complainants, as lessees of the Georgia Railroad & Banking Company, or to them jointly in any capacity.

II.

The assessment of the Comptroller was intended to tax only the property appurtenant to the Georgia Railroad and held by the Complainants as lessees.

The Assessment of the Comptroller General.

The bill avers and the answer concedes:

1st. That the Georgia Railroad and Banking Com-

pany from the year 1881 has been returning this property for taxation and has been paying the taxes required by Section Fifteen of the Charter thereon.

We do not claim that the Comptroller's action estops the State; but we do insist that the action of the Executive Department, persisted in for years, and despite resistance, is persuasive evidence of the meaning of the law.

Since this lease every department of the State Government, until now, has treated the Georgia Railroad and Banking Company as the proper and sole tax payer.

This is persuasive evidence of the law to a Court first declaring it.

Temple Church vs. Terminal Co., 128 Ga., 669, 680.

2nd. That in 1910 it tendered the same return, and the Comptroller General rejected such return, on the ground, not of incorrectness, but because he demanded that the lessees, instead of the Georgia Railroad and Banking Company, should return what the lessor had been returning.

3rd. The defendant did not demand, on the present occasion, that the lessees should return any interest or property, different from that offered by the lessor; but asserted that the **lessees** and **not the lessor** was the debtor-taxpayer, and made an assessment to reach this property and every interest therein, against the lessees.

4th. The assessment shows that it proposes to tax the entire value and interest against the lessees. It states:

Whereas Complainants are jointly operating the Railroads known as the Georgia Railroad.

(The Bill states and the answer admits, Respondent knew they held and were operating as lessees under Exhibit "A.")

Whereas they have failed to make a return of their

property (meaning as shown and admitted, not their **other** railroads or property, but—said Georgia Railroad.)

Whereas respondent demanded a return "of said Railroads with the appurtenances and franchises thereof and all property connected with, or used in the operation of said Railroads."

"Whereas complainants have failed and refused to make such return."

Now, therefore, I assess "the above mentioned properties, as follows:

Railroads from Barnett to Washington.
Railroads from Augusta to Atlanta, (exclusive of Terminals).
Railroads from Union Point to Athens.
Rolling stock and other property used in connection therewith, including the stocks and bonds leased.
Tracks and other property known as:
Atlanta Terminals.
Augusta Terminals (Transcript, p. 14).

It is, therefore, perfectly evident that the Comptroller General was not endeavoring to tax property, the title to which he claimed was **not** in the Georgia Railroad and Banking Company; but to insist that by the lease the **property** of that Company had been so transferred to the lessees that they, and they alone, were liable to pay all taxes to be assessed against it, that they must pay all such taxes on an ad valorem assessment, and that the taxing scheme of the 15th Section of the Charter of the Lessor was now inoperative as to its property.

III.

The Lease of the Georgia Railroad and Banking Company to W. M. Wadley created an usufruct, and not an estate, in the lessee.

An examination and analysis of this lease shows that its operation and effect are as follows:

By it the Georgia Railroad and Banking Company "rents and farms out" to Wadley and assigns, (heirs are not mentioned), for the term of ninety-nine years, without any provision for renewal:

"Its privileges, general and exclusive, of transporting persons, merchandise, products, and every kind of property;" and "as the means of full enjoyment of the privileges hereinbefore rented and farmed out, the following property, to-wit": (describing certain Railroads and personalty).

It **assigns** to Wadley and assigns its claim on the Walton Railroad for certain purposes; also its right of ownership, management, control and use of the Western Railroad of Alabama.

It agrees to **assign** and **transfer** the income on certain Atlanta & West Point Railroad Company stock, and to give an irrevocable proxy to vote the same.

Also the income of the stock and bonds of the Port Royal and Augusta Railway Company, with like proxy.

It agrees to **deliver** to the Second Party and assigns all steel rails then on hand. (Transcript, pp. 10, 17.)

No words of **grant** are contained therein; no estate is granted therein; what is rented is "Control, use or enjoyment."

It is insisted that the use of the word "Lease" determines the nature of the instrument and create **an estate,** as distinguished from **an usufruct.** This is an error. The word is used indiscriminately as to instruments creating each kind of interest.

Code of Georgia of 1910, Sections 3690, 3691.

It was insisted in the Court below that a tenant does not "possess" the property under an usufruct, that the landlord is in possession. The Code of Georgia defines an usufruct as "the right to possess and enjoy the use."

Code of 1910, Section 3691.

Such a tenant has "possession" and the "right of possession."

Code of 1910, Sections 3694-6-7-8.

Had this been an estate for years the tenant must have repaired at his own expense, without any contract so to do.

Code of 1910, Section 3689.

This duty the lease calls, **by contract,** on the tenant to discharge, which is an unnecessary provision if the instrument created an estate for years, as opposed to an usufruct for a like period.

It was necessary to relieve the landlord if an usufruct.

Code of 1910, Section 3699.

It was a terminable thing and contemplated the return to the landlord, at the end of a term, and not merely by default, and a settlement, then between Landlord and Tenant. It has no provision for any renewal after the year 1980.

It provided for betterments; "additions and substitutions" to **"be"** at once the property of the lessor, but deferred payment therefor by the lessor until the end of the term. That such additions become at once the lessor's property. See:

Bass vs. Metropolitan, etc., R. R. Co., 82 Fed., 857;
People vs. Barker, 47 N. E., 46.

While there is no case in Georgia of a lease exactly like this one, and no case holding that the lessee must pay taxes (except the perpetual ground-rent leases mentioned hereafter), we think there are cases which hold a lease, practically identical, creates only an usufruct.

The cases construing Railroad leases are:

Central Railroad and Banking Company vs. Macon, where the Central Railroad and Banking Company took a perpetual lease from the Macon and Western Railroad Company of its entire properties and franchises for the

term of its charter life (which was perpetual), with a provision for actual merger so soon as legislative authority therefor was obtained.

The lease was attacked because it was claimed to be a merger and not a lease, and because the Corporation had no charter power to lease. The question as to the character of the lease, if it was a lease, was not discussed.

The merger provision was held separable and inoperative, without the further legislation contemplated, and its legality not to be considered until such time. As a lease it was held **infra vires.**

The instrument spoke of the "term hereby granted." It covenanted for further "conveyances" if required, and was an entirely different instrument from the lease now in question.

Yet the Court did not, in any way, pass on its character, as creating an estate, or an usufruct, and the decision is without significance on that point.

Central R. R. & Banking Co. vs. Macon, 43 Ga., 605.

The next case arose under the lease of the Augusta Southern Railroad to the South Carolina and Georgia Railroad Company. The nature of the instrument was wholly different from that now under consideration. It was perpetual and "granted" the property to the second party, its successors and assigns, "To have and to hold" for the corporate life of the first party and all extensions or renewals thereof. The question raised, however, was **solely** whether it created a relation of lessor and lessee, or of partners, between the parties thereto, and the Court held it created the relationship of lessor and lessee, not of partners.

The question whether it created an estate for years as opposed to an usufruct was not raised or decided.

South Carolina Co. vs. Augusta Co., 107 Ga., 164.

The Appellant says the case is valuable because it holds that when "the lessee (was) put in possession, the lessee

became the absolute owner of the property for the term of the lease."

This was said in reply to the claim that the party termed lessor was really a partner and as such in joint possession. It did not deal with the nature of the interest, except whether joint or sole.

But this language could well be used in every sense as to that instrument which eliminated the lessor for all time.

Again in speaking of tenants who had no estate in the land, but only an usufruct, the Supreme Court of Georgia says:

> "A tenant, although he has no estate in the land, is the owner of its use for the term of his rent contract and can recover damages for any injury to such use occasioned by the erection or maintenace of a public nuisance," etc.
>
> **Bentley vs. Atlanta, 92 Ga., 623;**
> **Pause vs. Atlanta, 98 Ga., 92, 97.**

This sort of an interest is also termed a "leasehold interest."

Pause vs. Atlanta, 98 Ga., 92, 97.

The third case on this subject is that of Southern Railway Company vs. State of Georgia. There the State as the owner of the Western and Atlantic Railroad sued the Southern Railway Company for an alleged trespass on the Western & Atlantic Railroad right-of-way. The State was held to have no case because the injury, if any, was to the right of enjoyment of the lessee of the State, the Nashville, Chattanooga & St. Louis Railway, which held under a lease for twenty-nine years executed in December, 1890.

Southern Ry. Co. vs. State, 116 Ga., 276.

It was argued by appellant in the present case that the decision that the right of action was in the lessee

showed that this Railroad lease for a term of twenty-nine years created an estate in the property as opposed to an usufruct.

It is a sufficient reply to show that under the decisions just cited the tenant of an usufructuary interest can maintain such an action.

Bentley vs. Atlanta, 92 Ga., 623;
Pause vs. Atlanta, 98 Ga., 92, 97.

But in a later case the Supreme Court has held that this 29 year lease from the State to the N. C. & St. L. Ry. created an usufructuary interest only, which could not be taxed to the lessee.

State vs. W. & A. R. R. Co., 136 Ga., 619, 625.

This ruling has been repeated in a more recent case.

Western & Atlantic R. R. Co. s. Western Union Tel. Co., 138 Ga., 420, 430.

The only other cases are the Savannah ground rent cases where the owner of the estate, subject to the ground rent, was held liable for taxes even to the City to which he owed the ground rent.

But the Court closely discriminates and limits this case. It shows that the so-called lessee is really the owner of the fee, subject to a charge reserved thereon. That there is really no reversion in the so-called lessor but only an annuity reserved, and that on default, instead of re-entry resulting, the property is sold, the charges discharged; and any surplus paid to the lessee, the purchaser taking the same estate he had, subject to a like charge for the future. That he is in fact the owner for all futurity with full power of alienation.

Wells vs. Savannah, 87 Ga., 397.

The Supreme Court of Georgia has recognized this difference. In the case above cited it says:

"The case presented is not that of a perpetual leasehold where the tenant is the virtual owner of the

property entitled to its use forever and subject to pay taxes thereon as the owner, as was the case of Wells vs. Savannah, 87 Ga., 397."

State vs. W. & A. R. R. Co., 136 Ga., 619, 625.

This Wells case is similar to a recent case decided by the Supreme Court of the United States which cites it, and clearly draws the distinction between this perpetual estate charged with a ground rent and the estate created by a lease where a termination, however remote is contemplated. It recognizes the general rule "that the landlord is responsible for taxes," and puts the decision on the ground that the lessee is "virtual owner" and has "rights different from those usual in a mere leasehold estate."

J. W. Perry Co. vs. Norfolk, 220 U. S., 472, 479.

IV.

In the case of an estate for years, the landlord, or owner of the fee, and not the tenant, pays all taxes.

But even if this lease created an estate for years it would not change the relations, or liabilities, of the parties thereto as to taxes.

A lease, creating an estate for years, does not cast on the lessee the burden of paying the taxes on the property, or render it (the entire estate) taxable as the lessee's property. The lessor is liable for the taxes.

Taylor on L. & T. (3rd Ed.), Sec. 341;
E. T. V. & G. Ry. Co. vs. Morristown, 35 S. W., 771;
12 Am. & Eng. Enc. of L., (2nd Ed.), p. 709;
Boston Molasses Co. vs. Commonwealth, 79 N. E., 827.

Where a lessee covenants to pay taxes it is a promise to pay what the lessor owes to the State and is really due to the lessor as a part of the rent.

Perrins, etc. Co. vs. Cook, 93 S. W., 337;
Elliott vs. Grant, 64 Mo. App., 248;
Aught vs. Orchard, 92 Mo. App., 466;
McManus vs. Shoe Co., 60 Mo. App., 216;
Gedge vs. Shoenberger, 83 Ky., 91-94.

It is due as rent to the lessor:

Bowditch vs. Chickering, 30 N. E., 92;
Amory vs. Melvin, 112 Mass., 83, 87;
Carnes vs. Hersey, 117 Mass., 267.

In this State there is no change at all in the common law as to the lessor of an estate for years being chargeable with the taxes.

Reliance is placed on Code of 1910, Sections 1018, 3689, to show that a tenant for years is chargeable with all the taxes.

Section 1018 declares the owner is to be charged, if known—otherwise "against the specific property." "Life tenants and those **who own** and enjoy the property are chargeable with the tax thereon." Hence as between maker and holder of a bond for title, "the one reciving the rents or enjoying the use is liable."

Section 3689 only declares "a tenant for years is bound for all repairs or other expenses necessary for the preservation and protection of the property."

This is the rule of the common law and does not include taxes.

4 Kent. Com., p. 110.

A tenant for life pays the taxes, but in a tenancy for years the landlord pays them.

Cooley on Taxation, (3rd Ed.), pp. 819, 822.

Where a Bridge Company leased a bridge to a Railroad Company on long lease, but with provisions for re-entry, it was held that the Bridge Company and not the Railroad Company was taxable therefor.

Glenn vs. Miss. River Bridge Co., 54 A. & E. R. R. Cases, 308, 310;
Chicago & Alton R. R. vs. People, 38 N. E., 1075.

But if a tenant contract to pay taxes, that means only such taxes as the landlord is liable for, and if the landlord is exempt, or pays a special tax, such is the measure of the tenant's obligation.

People vs. Barker, 47 N. E., 46;
Bowditch vs. Chickering, 30 N. E., 42;
Underhill on Landlord and Tenant, Section 605, 607.

The lessor here provides for enlargement pending the lease on his own account, and at its own expense, in order to discharge its growing public duty. All property added or substituted "shall be" the property of the lessor.

Gardner vs. Ga. R. R. & Bkg. Co., 117 Ga., 522, 532.

This is especially true in a railroad lease like this. Lessor does not cease to be operating the property.

Ga. R. R. & Bkg. Co. vs. Haas, 127 Ga., 187, 193.

It does not, like in case of a sale, cease to be the owner. It has only at most created a chattel real interest in the thing it still owns, and operates it through the lessee as its agency.

In Re N. Y., N. H. & H. R. R. Co., 23 Am. & Eng. R. R. Cases, 43, 49;
Hutchinson vs. Hodnett, 115 Ga., 990.

In some leases additions remain the lessee's property and taxable as such to the lessee. This is only where the lessee can remove the same at the expiration of the lease. Here they become instantly the lessor's property.

Bass vs. R. R. Co., 82 Fed., 857;
People vs. Barker, 47 N. E., 46.

V.

The Charter provides a method of taxation of this property, certainly until it has ceased to belong to the Georgia Company.

This Section Fifteen of the Charter of the Georgia Company is not an **exemption** from taxation; but is a method of taxation affixed to the plant of the Railroad Company and contracted for by said charter.

Wright, Comptroller, vs. Ga. R. R. & Bkg Co., 216 U. S., 420, 425, 430, 432;
McHenry vs. Alford, 168 U. S., 651, 661;
Travers Co. vs. St. Paul, etc., C. R. Co., 76 N. W., 217;
Columbia W. P. Co. vs. Campbell, 54 S. E., 833, 837;
Boston Molasses Co. vs. Commonwealth, 79 N. E., 827.

In the case in the 168 U. S., 651, if the "method" was an exemption it would have been void under the State Constitution. The Supreme Court reversed the State Court. deciding that this method of taxation was not an exemption.

The provision of the Georgia Railroad charter prescribing this "method of taxation" is wholly unlike these charters which either say "the said Company is hereby relieved from paying taxes except one-half of one per cent," etc. (There a clear personal right is given.)

Or those other charters of which an example occurs in another Minnesota case reported in 119 N. W., 202, where it was provided that the Company at its option might pay a certain per cent of earnings and if it did, then it should not be taxed. There a mere personal option was extended, which it need not exercise and which depended on its personal choice for exercise.

Here it is prescribed that the property, railroads and franchises, shall bear a certain tax as an exclusive substitute of the other taxing methods.

Here also the original railroad company still owns the railroad. Nothing has occurred to relieve it of liability to the State to pay taxes thereon as provided by the charter.

Had this Railroad and franchises been sold out by judicial sale as in the cases cited by defendant, the Georgia Railroad and Banking Company would no longer owe any tax or own any interest in this Railroad and its franchises. Here it continues the owner and annually enjoys its ownership through the receipt of rent, and the betterment and keeping up of its railroads for use by it when the lease ends within a time that many persons now alive will live to see.

VI.

Accretions and accessions, proportioned to and suited to the increasing business of a carrier, are a part of its legitimate railroads and plant and subject to like taxation as its original road.

Such betterments are part of its Railroad and covered by the charter method of taxation, which is exclusive.

Wright vs. Ga. R. R. & Bkg. Co., 216 U. S., 420.

Suppose the Georgia Company had not leased and had so enlarged its plant?

What difference if it engages a lessee to act for it and at its expense?

No one would claim it could not legitimately make provision in heavier and safer tracks, larger and more cars and motive power, to properly discharge its public duties as the growth of the country and its commerce required.

The growth of its business is due to its location, not to any artificial manipulation.

The agreed statement of facts shows that geographically it lies between the Railroads of the Atlantic Coast Line on the East and those of the Louisville and Nash-

ville Railroad Company, on the West. It furnishes the highway of commerce, connecting the two systems. That it would do if it were not leased at all.

With close and friendly traffic relations it would handle the same traffic it now handles, if it were not under lease.

The growth of its equipment and motive power, and terminal and other facilities, is not disproportioned in any way to the growth of business shown.

No proof is offered to sustain a contrary charge.

The agreed statement of facts shows that its betterment and increase have been proportioned to its business, and moderate. See the tables in the Statement. (Transcript, pp. 49, 50, 51, 53, 58, 59. 60.)

The expenditures for roadway structures and rolling stock equipment are not more than $500.00 per mile per annum and about the same per mile per annum as before the lease. (Transcript, pp. 49-51.)

For exact figures see the statement of the case in this brief. (Supra pp. 13, 14.)

When this property was created the State prescribed a special mode of taxation therefor.

Substituting the definition of the opinion in Wright vs. Railroad Company, 216 U. S., 420, for the words "the stock of said Company;" the State contracted for all time that "the Railroad" with "improvements made from time to time" which "the necessities of an enlarging business and the improved maintenance naturally demanded" embracing "all property necessarily held and used to make that income, including the enjoyment of its franchises, upon which net income the scheme of taxation rests * * * * shall be subject to a tax not exceeding one-half of one per cent per annum on the net proceeds of their investments."

Wright, Comptroller, vs. Ga. R. R. & Bkg. Co., 216 U. S., 420, 425, 430, 432.

This method of taxation covers the entire investment made in the Railroad and property appurtenant thereto

in however high a state of development that entity thus created and endowed with franchises by the Act of 1883, may be.

City of Augusta vs. Ga. R. R. & Bkg. Co., 26 Ga., 651, 662.

The defendant admits that if the corporation invested Ten Million Dollars of money derived from earnings in creating a Railroad with rock ballast, steel bridges, heavy rails, providing terminals and depots required by the growth of the country and traffic served, this would be legitimate. He must admit that the State contemplated it would do these things and that its duty to the State under its charter required it to do these things. The charter contemplated an enlarging plant and authorized it.

Gardner vs. Ga. R. R. & Bkg. Co., 117 Ga., 522, 532.

We insist that if it borrows money either directly on bonds or notes and does these things itself, or from the lessees by the lease contract under which it must at the end of the lease pay, and causes these things to be done for it by the lessees, it is none the less an investment of the Company in and on its stock, which it must pay for ultimately from its earnings; that it is a part of the fund which produces the income from which it pays the one-half of one per cent required by the charter; that it is an accretion in the strictest sense, indeed a growth of the very trunk of the tree of the system; that the railroad and appurtenances are the same, and no other, entity, whether the condition of the road and its terminals be in efficiency like the Pennsylvania Railroad of today, or like the stringer tracks and link and pin equipment of 1840.

"A tax upon earnings is a tax which at last covers "and includes, unless double taxation be intended, "all property necessarily held and used to make that "income, including the enjoyment of the franchises."

Wright, Comptroller, vs. Ga. R. R. & Bkg. Co., 216 U. S., 420.

VII.

The charter method of taxation is not confined to the investment of the original Four Million Dollars of Stock.

The proposition that the Charter method of taxation applies alone to such undivided part of the Railroad and appurtenant property lawfully owned and used by the Georgia Railroad and Banking Company, by itself or lessees, legitimately embraced in its franchise and charter enterprise, as represents the original four million dollars of stock, and that any additional, though an equally proper part, is to be taxed **ad valorem,** is wholly unsound and is in antagonism to the essential idea both of the necessary unity of a railroad and the **duties** of betterment owed to the public under its franchises.

In the first place, even if the position is sound, this assessment of the Comptroller is void; he has no right to assess the entire road and appurtenances, because there may be **some values** in it which he can tax.

Again, if such an anomalous railroad can exist, that is taxable as to certain indivisible parts on income, and on other indivisible parts, **ad valorem,** the Comptroller has no power conferred on him to tax that kind of a railroad. The Act from which **alone** he derives power does not apply to such a railroad. He is as impotent as to it as he used to be in the matter of levying County or Municipal taxes.

He must show authority, for his present authority is a statutory exotic and not any inherent growth.

But in Georgia every part of a Railroad and its franchises, are one and indivisible.

City of Atlanta vs. Grant, Alexander & Co., 57 Ga., 340.

Farmers Loan & T. Co. vs. Candler, 87 Ga., 241.

VIII.

That a part of the leased property or its additions is

taxable ad valorem does not render the Complainants liable to be taxed therefor.

But even if the Georgia Railroad and Banking Company now owns Railroads and property not covered by the taxing scheme of Section Fifteen of its Charter,—if the extension into Athens, or Augusta Terminals, or added values any where exist, upon which **ad valorem** taxes are due, the complainants are not liable to the State for taxes thereupon, or to an assessment.

The Georgia Railroad and Banking Company is such tax payer, just as it is for the Macon and Augusta Branch or the Washington Branch, both of which are additions not covered by said Section Fifteen.

Instead of refusing to let the Georgia Railroad and Banking Company make a tax return the Comptroller should have called on it to amend its return. This Company could have resisted an undue demand. It could have had an arbitration if it desired. To say that the Georgia Railroad and Banking Company has additional property subject to **ad valorem** taxation is no reply to the insistence of these complainants that they do not owe to the State the duty of a return, or the payment of taxes thereon.

So, while we insist that all property, the title to which is in the Georgia Railroad & Banking Company, is covered by its Charter scheme of taxation and that the taxes thereon have been paid in the payment of one-half of one per cent on the net income; yet if it be held otherwise, these Complainants are no more liable to the State for **ad valorem** taxes thereon, than they are liable **to the State** for the **ad valorem** taxes of the Georgia Railroad and Banking Company on the Washington Branch, or the Macon and Augusta Railroad.

Now, it is manifest that every accretion, addition or substitution to the property of the Georgia Railroad and Banking Company, (except certain terminals in Atlanta, claimed by the respondent to be otherwise held) are owned **now** by the Georgia Railroad and Banking Com-

pany as completely, as it owns its main tracks. These are:

The one mile of track in Athens and Athens Terminals. This is not assessed separately and no value is placed thereon or claimed therefor in defendant's assessment. (Transcript, p. 14.)

The Augusta Terminals.

All improvements erected on its property in Atlanta and all rolling stock and equipment.

Hence they are the lessor's property, and the lessor is the State's tax payer and not the lessees.

IX.

The Complainants are not liable to be taxed on their leasehold interest as a separate property under the law of Georgia.

But defendant urges that these complainants as lessees own a leasehold estate of large value, for which they should have made a return instead of the Georgia Railroad and Banking Company.

This case is not whether the State can by summary process collect taxes from a recalcitrant tax payer; but whether the State can advise the Georgia Railroad and Banking Company that it will not treat with it at all as a tax payer and will tax the Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company on the property of the Georgia Railroad and Banking Company, instead of taxing that Company at all.

But even if that were not so, we deny that there is any interest in this property taxable under the law of Georgia to these complainants as lessees of the Georgia Railroad.

The Code sections bearing on this subject are as follows:

"All persons owning any mineral or timber interests, or any other interest or claim in or to land less than the fee shall return the same for taxation and pay taxes on the same as on other property. And any person failing to comply with the requirements of this section shall be proceeded against as a defaulting taxpayer."

Code of 1910, Section 1008.

"Taxes are to be charged against the owner of property if known, and against the specific property itself if the owner is not known. Life-tenants, and those who own and enjoy the property, are chargeable with the tax thereon. Hence, while the public may treat property as belonging either to the maker or the holder of a bond for titles, when the latter is in possession, yet as between the parties the one receiving the rents or enjoying the use is liable for the tax."

Code of 1910, Section 1018.

It will be noted that the interests to be separately returned are "mineral or timber or **other** interest." "less than the fee." This term "less than the fee" clearly does not refer to the estate in the mineral or timber, or other interest but means that an absolute fee simple title confined to mineral, timber, agricultural or other limited interest in the land, is an interest less than the fee; that is, the fee here means the aggregate of the mineral, timber and all other elements of the land value.

Code of 1910 Section 1008.

If it meant that a lessee must pay taxes separately on his interest, that would apply equally to a lessee of an estate for years or of an usufruct only. It would make the remainderman after a life estate, or the holder of the legal title, where there was a bond for title holder in possession, also pay taxes on their respective interests.

The Section must be read in connection with Section

1018 of the same Chapter, which says, that as between such divided ownership, or interests, extending through the entire property and divided only as to successive interests in the whole, the taxes are to be paid by him who is reckoned the owner; as the life tenant or the holder of the bond for title. As we have seen, this burden rests on the lessor, and not the lessee. (See authority already cited).

As already noted this is not the exemption of any property from taxation but is merely a requirement as to who shall pay the taxes and who is personally liable to the State therefor.

Taxation of property in the hands of one person, the owner, satisfies the State's claim for taxes thereon, and to again tax an interest in it in the hands of another person, although of value to him, is double taxation and not contemplated by the Constitution of Georgia.

> "3. A tax law will not be so construed as to re-
> "quire the same property to be taxed a second time,
> "unless such a construction is required by the ex-
> "press terms of the statute or by necessary implica-
> "tion.
>
> "4. When a tax is imposed upon that which has
> "inherent value in the hands of one person, and is
> "also imposed upon that which is a mere symbol
> "thereof in the hands of another person, deriving its
> "value solely from that which it represents, the same
> "property is twice taxed.
>
> "5. When a tax is levied against a corporation
> "upon all its property, and a tax is also levied upon
> "the value of the shares in the hands of the stock-
> "holders, that which makes up the value of the prop-
> "erty of the corporation and the value of the shares
> "of the stockholders is one and the same thing, and
> "under such a system of taxation the same property
> "is twice taxed."
>
> **Ga. R. R. & B. Co. vs. Wright, 125 Ga., 589.**

In this State the Statute fixed a method of taxation on this property, covering the taxes it owes, for its entire value.

Its owner, the lessor, is paying and offering to pay these taxes.

The Comptroller General is refusing to take these taxes and demanding that the lessees pay on a system substituted by him, to-wit: full **ad valorem** taxation as against the lessees of the entire taxes on the property which a fee simple owner, in the absence of a special method, would pay.

This case is wholly unlike the case of

Jetton vs. University of South, 208 U. S., 489.

There an exemption was limited for so long as the University remained the owner.

It made a contract, termed a lease, which was in fact a conditional sale, or rather a sale with certain conditions on which it might become again owner, and the case falls more within the class of

Wells vs. Savannah, 87 Ga., 397.

But even as to that, this case does not decide that the lessee under a lease is, or can be made, liable for **the taxes of the property.** The decisions in Tenessee are just to the contrary.

E. T. V. & G. Ry. Co., vs. Morristown, 35 S. W., 771; University vs. Skidmore, 87 Tenn., 155.

It only holds that Tenessee could, by Statute make a lessee liable for taxes on the value of his leasehold interest, whatever that might be. It expressly declines to decide how little that might be, but only that the lease in question created an interest that fell under the Statute passed by Tenessee in 1903, altering the previous rule which taxed the entire property to the lessor.

Jetton vs. University, etc., 208 U. S., 489, 503, 504.

In the Jetton case the property paid no taxes as long as the property remained that of the University.

The University parted with an interest and a Statute was passed to tax that interest in the hands of its owner.

In the case of E. T. V. & G. Ry. Co. vs. Morristown the City of Morristown in Tennessee, before this Act of 1903 was passed, tried to tax the Railway Co. as the holder of a 99-year lease, on the leased property and the Supreme Court of Tennessee, decided that it could not be done; that the lessor alone was liable for the entire taxes.

E. T. V. & G. Ry. Co. vs. Morristown, 35 S. W., 771.

X.

The demand that these respondents, Louisville & Nashville Railroad, a corporation of Kentucky, and the Atlantic Coast Line Railroad Company, a corporation of New Jersey, should pay to the State of Georgia taxes on stocks and bonds as insisted in the ninth ground for certiorari is without legal support.

The tax assessment of the Comptroller General, enjoined by the decree in this case, assesses $1,348,900.00 as the value of stocks and bonds upon which he is demanding taxes from the Complainants. (Transcript, p. 14.)

While the assessment does not enumerate these stocks and bonds the answer of the Comptroller General says they are "the bonds and stocks assigned in said lease to the lessee and now held by the Complainants." (Transcript, p. 22.)

It is stipulated that these stocks and bonds have been changed and are now:

15,000 shares of the stock of the Western Railway of Alabama (a corporation of Alabama);

8,818 shares of the capital stock of the Atlanta &

West Point Railroad Company (a Georgia Corporation);

Certain stocks and bonds of the Union Point & White Plains Railroad Company (a Georgia corporation);

$40.000.00 of Bonds of the Monroe Railway.
Transcript, pp. 57, 58.)

Under the Statutes of Georgia as recently construed by the Supreme Court of that State the taxation of domestic railroad shares in the hands of the shareholder is double taxation and not authorized by the Statutes of Georgia.

Georgia Railroad Co. vs. Wright, 125 Ga., 589, 598.

This would render the 8818 shares of stock of the Atlanta & West Point Railroad Company stock and that of the Union Point & White Plains Railroad Company non-taxable in the hands of any one, and the Court was right in not sustaining taxes thereon.

As to 15,000 shares of Western Railway of Alabama Stock its situs, so far as the corporation issuing it is concerned, is in Alabama.

Jellenix vs. Huron Min Co., 177 U. S., 1;
Delaware & Lackawanna R. Co. vs. Pennsylvania, 198 U. S. 341, 353, 357.

So far as the domiciles of these Respondents affect the question, such domiciles are respectively Kentucky and New Jersey, and any taxation of foreign Railroad Company shares to them as having situs through their residence could only be at their domiciles which are outside of Georgia.

So far as the Railroad bonds are concerned, these are choses in action, and are stated to be assigned to these Respondents. If taxable as their property (and it is as such that the Comptroller claims they owe taxes

thereon) they are certainly taxable at their domiciles and not in Georgia. The Court below properly repelled this claim of taxation.

State Tax on Foreign Bonds, 15, Wall, 300;
Kirtland vs. Hotchkiss, 100 U. S., 491, 498.

Georgia recognizes that the situs for taxation of Railroad Bonds is the domicile of the tax payer and she taxes foreign Railroad Bonds owned by her citizens in the counties of their residence.

Code of 1910, Sections 1016, 1075.

B.

ON THE CROSS APPEAL.

The property in the Atlanta Joint Terminals is:

1st. The original terminals and main line of the Georgia Company reaching from the City limits to the Union Passenger Depot in the City of Atlanta.

2nd. Certain property of the West Point Company.

3rd. Certain property of the Louisville Company.
(Transcript. pp. 84, 85, 86.)
(Amended Answer Transcript, p. 32.)

The assessment on the main line expressly excludes the part embraced in the terminals. (Transcript. p. 19.)

The terminals expressly include the entire system of tracks from Central Avenue, between Decatur Street on the North and Hunter Street on the South, to the City limits. (Transcript, p. 32.) Transcript, pp. 84, 85.)

Hence these terminals confessedly embrace a part of the original Georgia Railroad, and a tax on them is in large part on the leased property.

The description in the terminal agreement shows the other properties are severed by this Georgia Railroad, and border on its main line and tracks. (Transcript, pp. 84-87.)

XI.

As to the property derived from the Georgia Company, it is taxable to that Company as landlord and not to Complainants as lessees; as to that derived from the other companies, they should be taxed on it.

It is not pretended that the **Georgia Company** has made any other contract than the lease of 1881, or that the lessees have any other or different interest in the property of that Company used in the Joint Terminals at Atlanta. The relations between the Georgia Company and the lessees, as to it, are no different than they were before any Joint Terminal Agreement between the lessees, the West Point Company and the Louisville Company, was made, and are the same as exist as to the main line lying beyond such Terminals.

It must be conceded that such property is used, and necessary for use as, a part of the Georgia Railroad.

Under the decision of the Court below as to the liability of these complainants in the rest of this case, the Georgia Company, and not the lessees, was liable to the State for taxes on a considerable part of this terminal property, i. e., its own original property.

Also if any property, the title to which was in the Georgia Company has been added to its property, which (like the Washington Branch) was not under its charter scheme of taxation, it, as lessor, and not the lessees, was liable for whatever taxes were due thereon.

The property which was conveyed under the Terminal agreement by the West Point Company and Louisville Company to the Complainants remained in their control jointly with the Complainants. The West Point Company only transfers certain leaseholds interests. It goes

under such joint control for a term ending April 1st, 1980. Whatever title is transferred by the Louisville Company to its property contributed to this arrangement, is necessarily limited by the terms of this Joint Terminal Agreement, which only lasts for the remainder of the term of the lease of the Georgia Company or until April 1st, 1980. It was not greater than a leasehold. (Transcript, pp. 84, 85, 86, 89.)

It, therefore, remains property taxable separately to the West Point Company and the Louisville Company, as the true owners.

It is simply a method of each Company for providing terminals by joint arrangement for its separate benefit, and does not alter its interest in its own property and the liability to pay taxes on its property, embraced in the arrangement, just as before the arrangement was made.

The proposition that this joint use of the Georgia Railroad and Banking Company terminals is not in the interest of that Railroad or its business, or that such use is an alienation thereof, is not only wholly unsupported by the agreed statement of facts but is in the teeth of the decision of the Supreme Court of Georgia on the legal status of a practically similar arrangement.

Ga. R. R. & B. Co. vs. Maddox, 116 Ga., 64.

To tax the lessees of the Georgia Company under a demand for returns of the leased property, for this property of the Atlanta and West Point Railroad Company and the Louisville and Nashville Railroad Company held under this separate agreement undoubtedly would be the equivalent to demanding a tax return from A as the Executor of B, and taxing him under such proceeding as Trustee of C, because forsooth B,s estate adjoined the Trust property of C and A managed both.

As to the State's policy regarding the joint use of terminals by Railroads in Cities:

"Two or more chartered railway companies whose

"lines terminate in the same city, may, by contract, "within the corporate limits use the same track in "common, with or without common ownership, and "when they do so the company owning the track is "not responsible to its employees for injuries sus- "tained solely by reason of the negligent use of the "track by the employees of the other company."

Code of 1910, Section 2229.

XII.

No taxes can be lawfully collected of these lessees as to Atlanta Joint Terminals under the assessment sought to be here enjoined.

1. We have shown that inextricably intermingled in this assessment is the property of the Georgia Company, taxable only through the tax of one-half of one per cent on the net income.

It is impossible therefore to sustain, or to divide, this assessment. It is illegal as a whole and indivisible without a new assessment. The parties so concede in their Statement of Facts. The last sentence is that

> "If under the pleadings and under this statement "it is finally decreed that some part of said prop- "erty is subject to taxation. the taxable valuation "thereof is to be ascertained by such proceedings as "are lawful and proper." (Transcript, p. 61.)

The opinion of the Court on final hearing recognizes this. (Transcript, p. 94.)

Although therefore it is clear that this assessment includes property which is not taxable ad valorem, the Court by decree leaves the defendant at liberty to issue execution and collect on this entire assessment. (Transcript, p. 70.)

It is submitted that even if these complainants are taxable on these Terminals, this assessment should have at least been enjoined, with leave to make another, excluding the Georgia Company's property.

2. But this entire assessment made against this Atlanta Joint Terminal as a part of the Georgia Railroad property is illegal.

If this property is taxable it is not taxable as a part of the Georgia Railroad leased properties against its lessees.

This assessment is made by the Comptroller by Statutory authority authorizing him to tax railroads.

This assessment is to tax the Georgia Railroad and its branches and terminals and to make the lessees pay the taxes instead of the lessor. The answer so admits. (Transcript, p. 16.)

Now it is proposed to concede that that attempt is illegal; but under that attempt because it is insisted that the lessees (without further interest acquired from the lessor) have used some of the leased property by agreement with other carriers operating other lines of Railroad in conjunction with other property to create a "Separate partnership interest" (see amended answer); this other property is taxable under the original assessment of the Georgia Railroad.

It is submitted that if these Joint Terminals are taxable, they are not taxed by an assessment against the Georgia Railroad specifying, as one item, its main line from Augusta to Atlanta, exclusive of terminals, under a succeeding item of the same assessment assessing the Atlanta Terminals of that road.

If the State claims there is a taxable entity apart from the Georgia Railroad, embracing other and different property, created by another agreement, to which the Georgia Company is not even a party, she should assess that "separate partnership," or at least make a separate assessment against its properties.

Where an assessment is illegal as a whole and indivisible, it must fall, even though a legal assessment might be made.

Norwood vs. Baker, 172 U. S., 269, 292;
Oklahoma vs. Wells Fargo Co., 223 U. S., 298, 301.

We insist, in conclusion, that the points stated at the beginning of this brief are supported by the facts of this case and the law applicable thereto, and under the same:

(a) That the Georgia Railroad and Banking Company is the sole tax payer as to all properties owned by it, and the assessment of any of them to the Complainants was illegal.

(b) That there is no law in Georgia for taxing a lessee on a supposed separate leasehold interest value.

(c) That all railroad property and equipment owned by the Georgia Railroad and Banking Company is one and indivisible, operated under an indivisible franchise and could not be parceled for any purpose between lessor and lessee.

(d) That all such property, except the Macon and Augusta and Washington Branch Railroads fall under the taxing scheme of Section Fifteen of the Charter.

(e) But if not, then like the Macon and Augusta and Washington Branch Railroad it is taxable by the State only to the Georgia Railroad and Banking Company and not to these complainants.

(f) That as to all property the title to which is not in the Georgia Railroad and Banking Company, it is owned by other corporations and is taxable to them and not to these Complainants as lessees of the Georgia Railroad and Banking Company.

(g) That as a consequence complainants are entitled to a decree as prayed, perpetually enjoining the enforcement, by defendant of this assessment for taxes against them.

JOS. B. CUMMING,
ALEX. C. KING,
of Counsel.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 162

WILLIAM A. WRIGHT,
Comptroller General,
Petitioner and Cross-Respondent
vs.
LOUISVILLE & NASHVILLE RAILROAD CO.
and ATLANTIC COAST LINE RAILROAD CO.
Respondents and Cross Petitioners

Writ of Certiorari and Cross-Writ to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR RESPONDENTS AND CROSS PETITIONERS.

Respondents and cross petitioners desire to correct certain statements in the briefs filed for William A. Wright, Comptroller General, and to reply briefly thereto.

I.

The counsel for the Comptroller General have misconceived the purpose of the complainants in the Court below, in stating that they have sought to narrow the

point to be decided to the technical sufficiency of the particular assessment sought to be enjoined.

What the complainants have sought to have decided was:

1. That the Georgia Railroad & Banking Company who offered to make returns of the entire railroads and property assessed by the Comptroller, was the proper tax payer, and that complainants were not,

2. That the proper method of taxation was that prescribed by the charter of the Georgia Railroad & Banking Company except as to the Macon & Augusta, and Washington Branch, Railroads which the Comptroller was taxing to it **ad valorem without controversy** and as to which he avers he is willing for it to pay the taxes.

3. That the Lessees of the Georgia Railroad were not taxable under the laws of Georgia upon any **separate** interest or estate in the property in their possession under the Georgia Railroad lease.

4. That the Comptroller's assessment did not purport to levy any assessment on any leasehold interest; but sought to assess the entire fee simple interest, as an estate in possession, to the complainants as owners.

5. That such being the assessment, and the same not showing the value or interest of any less estate than the fee, and not being capable of being divided, it is no foundation for a levy of taxes on any such smaller estate or interest, so that the entire levy is illegal and must fail.

II.

The citation on page one of the Brief of Mr. Sibley should no refer to the Act of December 27th, 1831. It should be the Act of December 21st, 1833, Section 15. The Act of December 27th, 1831, is an Act which is repealed by the Act of 1833, Section 23, and is alluded to therein only for the purpose of being so repealed.

III.

There is nothing in this record which indicates that the Comptroller General, as stated on page five of the brief, was ignorant, or acted on any misapprehension of facts, prior to the year 1910, or that he ever ceased levying taxes against the Georgia Railroad and Banking Company as the proper tax-payer until the decision of this Court in the case of Wright, Comptroller General, vs. Georgia Railroad & Banking Company 216 U. S., 420, demonstrated that the effort on the part of the Comptroller, to tax this property in a method different than that prescribed by its charter, was illegal.

With the handing down of this decision the Comptroller adopted the policy of refusing to receive a return from the tax payer whom he had recognized for twenty-eight years, and reversing his policy of regarding the owner, and not the tenant, as the proper tax payer, he then refused to receive a return of its property for taxation (except the Macon & Augusta Railroad taxed **ad valorem)** from the owner and demanded that the tenants, Louisville

and Nashville Railroad Company and Atlantic Coast Line Railroad Company should return (not their interest, or any less estate in the property, but) the entire property, and the entire interest and estate therein. (See original bill paragraph 10, original answer paragraph 10. Transcript, pp. 3, 16.)

The Comptroller emphasizes this by stating in his said answer, paragraph ten, that he notified both the Georgia Railroad & Banking Company and the Lessees that he refused to receive returns from the former and would require returns to be made by the latter. (Transcript, p. 16.)

This also should defeat the contention now insisted upon in this case that under this assessment, the comcomplainants in the case were required to return any particular interest which they had in the property separate and apart from that of the owner, the Georgia Railroad and Banking Company.

This is emphasized by the admitted fact that as to the Macon & Augusta Railroad he was content to receive returns from the Georgia Railroad & Banking Company alone, because on this property he collected taxes ad valorem. He made no demand for any separation of interest of lessor and lessee.

IV.

On page six of the brief of Mr. Sibley, it is stated that no complaint is made of the amount of the assessment.

This averment is without significance unless it is intended to convey the meaning that the amounts of the assessment are conceded to be reasonable. This, however, is entirely unwarranted by the record in a case where the complainants were insisting that they were not the tax payers at all, but that taxes had been assessed against them when the taxes should have been assessed against another. An effort to litigate, or question, the amounts of the alleged illegal levy would have been entirely irrelevant.

Furthermore, it would have been a matter which a Court of Equity would not in this litigation consider.

Norwood vs. Baker, 172 U. S., 269, 294.

V.

On the same page counsel states that complainants sought by exceptions for impertinence to restrict the inquiry to the naked question of injunction of the assessment as it stood. This is entirely correct.

It is respectfully insisted that the final opinion and decree of the District Court demonstrate that it should have so restricted the inquiry. If this assessment as a whole is illegal, it did not furnish the data, nor could the Court be put in the position, to ascertain, or decree, what was the amount of taxes actually due.

The Court in his opinion, while holding that the interest of the Lessee Companies in the Atlanta Terminals is subject to taxation ad valorem, states "There may be

some part of this terminal property which amounts to a mere betterment of the old property, and not thus subject; but what that may be I am unable at present from the facts before me to determine. Counsel agree, as I understand it, that should this property be so subject it would require either a reference, or some further action, to determine this". (Transcript, p. 70).

It was stipulated in the agreed statement of facts that "If under the pleadings, and this statement, it is finally decreed that some part of said property is subject to taxation, the taxable valuation thereof is to be ascertained by such proceedings as are lawful and proper." (Transcript, p. 61).

Yet in entering the decree on the assessment attacked, it is decreed "that the Atlanta Joint Terminals are subject to ad valorem taxation. * * * * As to the assessment and the enforcement of collection against said Atlanta Joint Terminals an injunction is refused and denied." (Transcript, p. 72).

The Court would have avoided this inconsistency and the sustaining of a taxation upon property, as to which he rules that the facts do not show what part is taxable, and as to which the Agreed statement of facts concedes that further proceedings are necessary to separate the taxable from the non-taxable, had the Court recognized, if the assessment was not sustained as an entirety, on the theory that the whole property of the Georgia Railroad & Banking Company should be assessed ad valorem upon its fee simple value in the hands of these tenants,

that the assessment was illegal, and that the enforcement of taxation under such assessment should be enjoined.

It is true that the bill prays for a decree adjudging that these complainants were not chargeable with taxes, or any part of them, on the property included in the assessment aforesaid. But taking the prayer, with the averments, all it meant was that they were not chargeable with the taxes claimed, or any part of them, upon the property included in the assessment under the scheme and scope of such assessment. If there was any indivisible part of said property, or any less interest therein, which was so taxable, nevertheless, this assessment, and taxation thereunder should have been enjoined without prejudice to another assessment, if such other assessment could be lawfully made.

For the Court under this assessment to undertake to separate property, or apportion interests and adjudge values, even if there were some taxable interest, makes the Court act as the tax assessor or tax gatherer, and converts this litigation into one in which a decree would have been rendered against the complainants on a theory presented which practically amounts to saying "the comptroller has made an illegal levy, and has sought to make the tenants of this property pay **ad valorem** on the entire value of this property in entire disregard of the provision of the charter of the Georgia Railroad & Banking Company, but the Court while holding this to be illegal, will make a new levy and a new assessment upon such part of, or interest in, this property, if any, as it may find subject to **ad valorem** taxation in the hands of complainants."

VI.

Counsel on page ten of the above quoted brief says that "Complainants are in possession of the property enjoying its use. Presumptively it is taxable, and they owe the taxes." While as a general statement it might be admitted, **Possession prima facie** indicates ownership; and that presumptively property is taxable to the owner, the statement is wholly inapplicable to a case where it is conceded that the Georgia Railroad & Banking Company is the owner of the property, and is in possession by its tenants; that the complainants are in possession only as tenants of such owner, and that the owner is enjoying the benefit of its property as landlord, receiving rent on a contract of rental for a limited term without provision for renewal; and further, where the property was created subject to a method of taxation prescribed by the charter under which it was created, which is a public law of the state with knowledge of which every one stands charged. The charter itself provides in Section 23 "that this act of incorporation shall be deemed and taken to be a public act and shall be judicially taken notice of as such without special pleading."

As a matter of history it can be stated that at the time this Act was passed and for many years thereafter, there was no taxation of railroads under the general tax statutes of the state, but taxes thereon were collected solely by virtue of the provisions of the several charters of the different railroads, and all of these charters universally provided taxation by a collection of a per cent upon the earnings. Further, that the first general statute taxing

railroads laid the tax of one-half of one per cent. on earnings where no charter contract existed.

Georgia Acts of 1858, p. 105;
Georgia Acts of 1861, p. 81.

This method of taxation continued until the year 1874.

Georgia Acts of 1873, p. 65.

This is a part of the railroad tax history of the State of Georgia. The taxation of railroads ad valorem was first made the policy of the State by the Act of 1874.

Georgia Acts of 1874, p. 107.

VII.

The counsel on page twelve of his brief says "the statement of fact having been prepared by the complainant, if its language or silence raises doubts as to the status of any property, the doubts should be resolved in favor of taxation."

The same vice is expressed in this conclusion as that which pervades this entire argument, i. e. That if the statement of facts demonstrates that the assessment of the Comptroller was illegal and void, if it suggests that another, different and legal assessment covering an unknown part of the property could have been made, the Court should deny relief.

But the statement that the "Statement of Fact was made by the Complainant", is not correct. It was made

and agreed to as the joint work of the Complainants and Defendant and as such it is signed by counsel for both sides. (Transcript, p. 61.)

It does not appear who was the scrivener, but it is evidently adopted, corrected and assented to by both sides and is in law and fact equally prepared by both sides.

It is stipulated therein, that the assessment made is not sufficient to support the taxation of **a part** of the property as it concludes that if a part is decreed to be taxable, "the valuation thereof is to be ascertained by such proceedings as are lawful and proper". This could only be a new assessment.

Norwood vs. Baker, 172 U. S., 269;
State vs. Taylor, 72 Texas, 297.

VIII.

On the same page twelve counsel says that the taxing method prescribed by the charter of the Georgia Railroad & Banking Company "is pertinent in dealing with that company as to any taxes it may owe, but wholly irrelevant in dealing with the complainants, **about any taxes they may owe.**"

It is submitted that this criticism wholly loses sight of the fact that what the Comptroller General has attempted by this assessment, is to make the lessees pay the taxes formerly demanded from the lessor company, which is still the owner of the property which is an active

going concern, which has not parted with its property, but which has leased the property with all of its incidents, and he is attempting to apply to such a condition the rule which pertains where a railroad possessing a tax exemption has either itself sold, or been under judicial process sold out, and the company's entire property has gone to another owner.

This contention also shows that the counsel for the Comptroller is seeking to change this case from an attempt to hold these complainants liable as the sole payers upon all interests in the entire property assessed, to an inquiry as to whether the complainants may have some property, or some interest in the property, upon which an assessment for taxation, based upon other principles, could be levied.

It is excedingly pertinent to consider the limitations on the taxing power contained in the charter of the Georgia Railroad & Banking Company where it is conceded that the Georgia Railroad & Banking Company remains the complete owner (as it is) of the railroad and property described in the lease contract.

IX.

On page seventeen of the same brief counsel says that the true question is "is the property assessed against complainants or any part of it, or any interest in it taxable to them". This is not the true question. To so make it would be to convert the Court below into a taxing officer. The question in the case is "can the Comptroller General

sustain an assessment made of this property to these tenants as the parties bound to pay the taxes due thereon and all of the taxes due thereon?" It is a case in which he has **refused** to receive a return from the owner and demanded that the tenant shall, in the place of the owner, return the entire property and every interest thereon, and pay taxes upon the whole, **ad valorem,** without regard to the charter.

The position on page eighteen et. seq. of the above brief that Taxes are chargeable to the "owner" of property is sound.

But who is the "owner" in this case? The Georgia Railroad & Banking Company, the landlord and owner in fee simple, presented a tax return for the property. The Comptroller General notifies it that he will not receive such return from it as owner (although he has been so doing for twenty-eight years) but that its tenants must make returns of the entire estate.

Illustrations are given of certain classes who are treated as owners—

The owners of mineral and timber interests are instanced. But this means that one who **owns** the mineral interest, is to return that for taxation and he who owns the **other** interests return them.

As to Life Tenants (including dower and homestead estates), there the remainder estate is a deferred estate. It is wholly unlike a tenancy where the posession of the tenant is in the right of the landlord and is his posses-

sion. It does not alter the rule of the Common Law that while Life Tenants pay the taxes on the entire property, in the case of estates for years the landlord pays all of the taxes thereon.

Cooley on Taxation, pp. 818, 822.

The quotation on page twenty of the brief for the Comptroller from 140 Ga., 593, does not illustrate who is the "owner", as between landlord and tenant, who should pay the taxes, or whether the taxes due on the premises owned by the landlord when fixed by a contract between it and the State can be ignored and the entire estate taxed to the tenant on a different basis.

The gist of the decision is expressed in the first and succeeding sentences thereof as follows:

> "Want of title in the defendant to the premises "on which the lien is claimed and alleged title in a "third person, who is no party to the suit will not "bar an action for foreclosing and enforcing the "statutory lien of a materialman. If the defendant "has any interest in the premises upon which the "lien can take effect that interest is bound." (Cit- "ing several cases.)

Wilson vs. Chamberlin, 140 Ga., 593.

The sentence which immediately follows the quotation made by the Comptroller's counsel also shows its irrelevancy in the instant case. That sentence is:

> "That a laborer or mechanic is entitled to a lien "on whatever interest his employer had in the prop-

"erty at the time the work was done, or the mater-
"ials were furnished, has been recognized by this
"Court in a number of cases (citing seven cases)"
Ib.

The facts of the case showed that the building was erected by a lessee for years in accordance with plans and specifications agreed on with the owner, and that the building became the property of this landlord at the termination of the lease.

XI.

The statement on page twenty-four that the word "assigns" is incompatible with a tenancy and indicates a right to assign without consent is an error. It is the appropriate expression in a contract of lease creating only an usufruct, not assignable without consent of the landlord, to be used to give his precedent consent to the making of assignments which otherwise the tenant could not make.

XII.

The sub-head of the brief in behalf of the Comptroller above alluded to, again discloses the attempt of counsel for the Comptroller General to divert the question raised in the brief of complainants from the legality of the effort of the Comptroller General to refuse to recognize the Georgia Railroad & Banking Company as tax payer, and to compel the complainants to occupy the position of the sole tax payers of this property, into an inquiry as to whether complainants owned at least a taxable interest.

We have argued in the brief in chief that whether complainants have merely a usufruct, or an estate for years at common law, under the principles, and methods, of taxation prevailing in the State of Georgia, the Georgia Railroad & Banking Company as the landlord and owner is liable for the taxation of the entire property, including the leasehold interest, and that, there are no provisions of the statutes of Georgia for separating the interests of landlord and tenant, and taxing the same separately to each. We desire, however, to correct a few errors of statement contained in this sub-head of the brief, for example:

On page thirty it is said that $6,311,363.08 has been expended for additions, betterments and improvements to the leased property; also further down on the page it is stated; "To say that 6,000,000 of dollars of taxable funds of foreign corporations invested in Georgia by them for their own benefit and use can be screened from equal taxation as "stock of Georgia Railroad & Banking Company, is absurd."

The figures above named are taken from the Agreed Statement of Facts, as to the total amount of money which has been expended upon the Georgia Railroad & Banking Company for such additions, betterments and improvements, including the rolling stock for use therewith, since the lease. The following, however, has been omitted;

"Of this sum $4,633,512.77 was paid out of the net income of the leased property under the heads of "Road-

way & Structures and Rolling Stock Equipment" (Transcript p. 50).

Much of this is shown by the items to have been ordinary replacements of the rolling stock. Much of it has actually replaced the rolling stock turned over to the lessee at the time the lease was made. (Transcript pp. 52, 53). The only money, outside of actual earnings of the property, spent on, and in connection with, the property is the sum of $1,677,850.31. (Transcript, p. 51).

XIII.

We have discussed in the brief in chief the meaning of the Code Section 1008 providing for the return for taxation of mineral and timber interests.

We have also discussed the inapplicability of this argument to sustain the assessment made by the Comptroller General seeking to require the lessee to pay taxes for the entire value of the property, and not seeking to divide the estates or interests therein. Indeed a sentence upon page thirty-two of this brief sustains fully the attack which we have made upon the Comptroller General's action in this case. That sentence is this: "But **when as here** the alleged owners are taxable by **different rules** it is not only the right but the duty of the tax officers to separate the taxable interests and enforce the Constitutional ad valorem taxation as far as it may be enforced."

In this case the Comptroller General repudiated this

alleged right and duty. He refused to receive the tax returns from the landlord owner; he refused to make any attempt to separate the property or interests upon which he claimed the lessee was separately taxable. His contention and his attempt was to refrain from separating the taxable interests, now claimed by his counsel to exist, to different persons, and to insist that the lessees should pay ad valorem taxes upon property owned by the landlord upon which the charter method of taxation was wholly different.

To demonstrate that his entire attempt was to have **some one** pay ad valorem taxes on all of the property, it is only necessary to consider his action as to the Macon & Augusta Railroad. As to this, he accepts a return and taxes from the Georgia Railroad & Banking Company, although if he had applied the above contention of his counsel he should have required the return of the leasehold estate from the lessees and of the reversion in fee from the Georgia Railroad and Banking Company. (Comptroller's answer, Transcript, p. 17).

XIV.

As to the authority cited by counsel for Comptroller General in regard to taxation on betterments, it is evident that the case cited from Missouri (19 Mo., 501) means that where the lessee places improvements on property which remain his, and which he has the option to remove unless he is compensated therefor at the expiration of the lease, such lease will be construed to mean

that these improvements are not the property of the lessor, at all, unless lessor elects to pay for them, and then they become the lessor's property. That is entirely different from the situation in this lease. The clause quoted on the succeeding page of this brief, page thirty-five, shows that the property substituted for, or added to, that received by the lessees from the landlord becomes **at once** the property of the landlord to the same extent as the original property. There is no option on the part of the lessor to pay for it, but the property which has thus become, and is at all times, the property of the lessor is to be paid for by it at the end of the lease.

The status of the Rolling Stock is clearly shown by the provisions in the lease quoted on page thirty-five. The natural, obvious and indisputable construction of the phrase "shall be the property of the party of the first part" is that in the future period, immediately following the date of the Lease, **whenever** new rolling stock is acquired, it became then and there the property of the Lessor. This being so, the rolling stock is **not** "Clearly the property of complainants and taxable to them" (page thirty-four); and the complainants, the lessees, "can **not**" put it on another road if they wish." (Page 35.)

XVI.

Supplementing the argument made as to the fact that these lessees are not taxable as to the stocks and bonds mentioned, it is admitted in the brief last above mentioned, that all of these stocks and bonds "have been as-

signed to Lessors who held the title to them for the time being". It is perfectly evident that these stocks and bonds did not relate to the management of the railroads leased by the Georgia Railroad & Banking Company, being stocks and bonds of separate corporations, some of them in foreign states. To speak, therefore of these stocks and bonds as being taxable to these defendants, is to assert the right of the State of Georgia to tax non-residents upon personal property because such personal property would be taxable if owned by corporations of the State.

There is another error in this brief which we desire to correct. On pages thirty-six and thirty-seven it is asserted, as it is also asserted in the supplementary brief filed by the Hon. John C. Hart that $700,000.00 has been raised in bonds and invested in a depot in Atlanta and a round house in Augusta in purchasing steel rails and relaying track rest at Madison, Georgia. This is an error. Of these amounts $200,000.00 was raised in 1854 by bonds to relay the line of railroad west of Madison, Georgia (transcript, page 49). The purpose for which this money was spent, shows that it was the mere replacement of the original track. We are warranted in stating that these bonds were many years ago repaid from the earnings of the property. A history is given of the Georgia Railroad & Banking Company bonded debt. (Transcript, p. 55.) These bonds do not appear as furnishing any of the considerations for which other bonds of the Georgia Railroad & Banking Company were issued, although the account goes back to the year 1876. The remaining $500,000.00 do not appear to have ever been raised by bonds, but

$200,000.00 appear to have been spent in 1868 to build a depot in Atlanta and a round house in Augusta (doubtless, replacing those destroyed), and part of this sum seems also to have been spent to relay track and purchase cars (an absolutely current expense) $300,000 in money seems to have been spent also to purchase steel rails for the purpose of being laid on the railroad (Transcript, pp. 49, 57). Therefore, the argument that this $700,000.00 represents anything but the railroad with improvements made from time to time, which the necessity of an enlarging business and improved maintenance naturally demanded and was property necessary to make the net income upon which the charter scheme of taxation rested is unfounded. As such, it was "subject to a tax not exceeding one-half of one per cent. on the net proceeds of their investments."

Wright, Comptroller General, vs. Georgia Railroad & Banking Co., 216 U. S., 420, 422, 425, 432.

XVII.

There is nothing peculiar in the Athens and Augusta Terminals, (Sibley Brief, p. 37.) They are betterments and additions to "the same property", the same railroad, and are in the same status as new rails, new rolling stock, etc. The actual terminus of the railroad stopped short of its charter terminus, Athens, and the railroad was extended. It is admitted by the Comptroller that title to all of the land needed for the extension was taken in the name of the lessor.

The Augusta Terminals were too contracted for the enhanced business and land was acquired for larger ter-

minals—and the titles taken in the name of the lessor. In the Gardner case, the Supreme Court of the State held that this was within the scope of the charter.

XVIII.

The last head of this brief "Practical Results" sets forth views, doubtless most admirable in themselves, but unfortunately without legal support. We point out the confusion made by Counsel in the last paragraph forty-one, and elsewhere in the case of the rental $600,000.00 with the net earnings of the chartered property. The difference between them is distinctly and elaborately set forth in the Agreed Statement of Facts. The rental is paid for a large amount of property of which the chartered property is only **a part** (Macon and Augusta Railroad, etc.) From the commencement of the lease the net earnings of the chartered part of the property have been carefully ascertained annually and the charter tax has been paid on **them**. They have generally been less than the rental though in a few years they have exceeded the rental. The rental, $600,000.00, has never been the basis of the tax of one-half of one per cent. on the earnings.

After all is there not this final proposition in the case? Whoever is liable for tax on the chartered property whether lessor or lessee, the **kind** of tax is the tax fixed by the charter.

XIX.

Replying briefly to some points in the brief of Hon. John C. Hart we observe:

1. The language, used on **page 10** of the brief, to show that the parties to the lease intended more than the **use** of the property, shows exactly the contrary. "Such privilege" refers to the privilege of "transporting persons, merchandise, produce and every kind of property whatsoever". The words "in this behalf" refers to the same things, that is to say the privileges and obligation relating to the use of the property.

2. When the brief writer on **page 12** states "The Estate for years taxable", what does he mean to assert? That the tenant for years has an interest, a valuable property, in his tenantcy, in his right of possession and control of the premises, which is taxable? Or that the tenant for years pays all taxes for which the fee is liable? If the first proposition is the one meant, then while we deny it, we say: Even if it were true, the question does not arise in this case". If the second proposition is asserted, viz: that the tenant for years is liable for the taxes chargeable on the fee, while denying that, we ask "**What** taxes are chargeable on the fee". The most comprehensive view urged by Appellant of the scope of Appellees' interest does not accord to them the fee, but at most an estate for years. Now the most that can be deduced from this is that the life tenant or tenant for years must pay the taxes for which the fee is liable. The carving of an estate for years out of the fee may create a new subject of taxation, assessable to the owner of that new subject; or it may make the tenant liable to pay the taxes assessable to the fee; but can it change the status of the fee in its relation to taxation? In other words, if the fee is not taxable, does it, the fee, become taxable by having a less estate

carved out of it? This, cleared of all confusion, seems to be the contention of appellants. It is admitted that if the lessor resumed tomorrow the operation of its railroads, they would be taxable by the charter method only; but it is contended that if the operation of them is turned over to another person, a tenant for years,—**they**, the railroads,—**not the interest which the tenant has in them,** become immediately taxable, by a different method on a different valuation and at a different rate.

3. The case of Penick vs. Atkinson, cited on **page 14** furnishes no support to Appellant's contention. It simply decides that taxes are assessed against **the fee,** in this case a "base fee", a fee subject to be defeated.

XX.

4. Appellant clings most tenaciously to the fact, as one favorable to him, that the lessee agreed to pay taxes. See brief, page **19.**

Let it be answered once for all, that at the date of the lease, the lessor held two kinds of property, one taxable under its charter in a special way, and the other admittedly subject to **ad valorem** taxes, as for instance the Macon and Augusta Railroad; and might thereafter acquire other **ad valorem** taxable property. The lessee agreed to pay the taxes on this latter class of property. There was nothing in this agreement that admitted that otherwise non-taxable property would become taxable when leased, or that the lease would make it so.

5. The "conclusion", brief page 21, is a virtual surrender of the case except for a judgment for taxes on the value of a leasehold estate. That this cannot be properly awarded under the assessment made, or in this case, we have heretofore discussed and most earnestly contend.

JOS. B. CUMMING,
ALEX C. KING,

Of Counsel for Respondents and Cross Petitioners.

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OCT 17 1914
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Supreme Court of the United States

OCTOBER TERM, 1914

No. 162

WILLIAM A. WRIGHT,
Comptroller General, etc.,
PETITIONER

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, AND ATLANTIC COAST LINE RAILROAD COMPANY,
RESPONDENTS

AND

LOUISVILLE & NASHVILLE RAILROAD COMPANY, AND ATLANTIC COAST LINE RAILROAD COMPANY,
CROSS-PETITIONERS

versus

WILLIAM A. WRIGHT,
Comptroller General, etc.,
CROSS-RESPONDENT

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ADDITIONAL BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS.

BY JOS. B. CUMMING,
Of Counsel.

Johnson-Dallis Co., Printers, Atlanta, Ga.

IN THE

Supreme Court of the United States

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LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY,
Respondents,

and

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY,
Cross-Petitioners,

versus

WILLIAM A. WRIGHT,
COMPTROLLER GENERAL OF GEORGIA,
Cross-Respondent.

Writ of Certiorari and Cross-Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ADDITIONAL BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS

By JOS. B. CUMMING

STATEMENT OF CASE.

May 7, 1881, The Georgia Railroad and Banking Company rented all its railroad properties to William M. Wadley and his assigns for a term of ninety-nine years. (Record 8.)

By various mesne conveyances Appellees now hold, and have held and operated for a number of years, said properties under the agreement between the Railroad Company and Wadley.

July 26, 1910, the Comptroller General of the State of Georgia, reciting that the Appellees had failed to return said properties for taxation, proceeded "in obedience" as he claims, "to the statutes in such cases provided" to assess all of said properties for ad valorem taxes for said year at an aggregate valuation of $17,883,306.

Thereupon Appellees sued out an injunction in the Circuit Court of the United States for the Northern District of Georgia—the main contention of the Complainants in the Bill of Injunction being that, as to the great bulk of the property assessed, they were only tenants and that they were not—but the landlord alone was—liable for the taxes.

The cause was heard on Bill and Answer and on Agreed Statement of Facts, and a Decree rendered granting the Injunction as to all the property involved except that part of it known as the Atlanta Joint Terminals. As to that part the Injunction was refused. Record 72.)

From this Decree the Comptroller General entered an Appeal to the Circuit Court of Appeals, U. S., for the Fifth Judicial Circuit, and thereupon the Complainants entered a Cross Appeal as to so much of the Decree as refused an Injunction as to the Atlanta Joint Terminals. (Record 73, 76.)

The Circuit Court of Appeals sustained the Decree of the District Court both in the grant and the refusal of the Injuction. (Record 98.)

Thereupon the Comptroller General petitioned this

court for, and obtained from this court, a Writ of Certiorari; and the Complainants in the Bill petitioned for, and obtained, a Cross Writ of Certiorari. (Record 101-102.)

BRIEF AND ARGUMENT.

What this case is not:

It is not a case, in which the Comptroller General of Georgia seeks to tax a leasehold estate.

The assessment made by the Comptroller General, on which this case is based, was of the whole property owned by The Georgia Railroad and Banking Company and leased by it to Complainants; and not an assessment of any leasehold interest which Complainants may have in that property. (See assessment, page 14 of printed record and opinion of District Judge, page 61 of the record.)

If this proposition is correct,—and it is sustaned by the record—it disposes finally of any argument based on the case of Jetton vs. The University of the South, 208 U. S., 489 (See opinion of District Judge, pages 68-69 of Record).

This disposes also of the second assignment of error (Record page 73) as the case as made presents no feature, to which that assignment applies.

The first, third, fourth, fifth and seventh assignments of error (Record, pages 73-74) can be treated together as they all depend on one question. That question is: Is the property, covered by the charter of the Georgia Railroad and Banking Company subject to taxation when operated by parties, who rent it, although it is not sub-

ject to taxation when operated by the owner, the landlord, who has rented it out for a term of years?

There is the sub-question to be considered, viz: Of what does that property consist?

There was a stage in this litigation when the latter was an undecided open question—when it was contended that the charter covered property of the value of only $4,156,000, and that all the value of the railroad over and above that sum was taxable. But that question has been finally closed. Wright, Comptroller General vs. The Georgia Railroad and Banking Co., 216 U. S., 420. **passim.** In that case it is held:

> "Where the capital of a corporation is exempted "from taxation, the exemption continues, even if "the property appreciates in value; and where, as "in this case, it is evident that the legislature in- "tended that the taxation of the corporation should "be measured by the income, the exemption will not "be construed as limited to the then value of the "property, so that natural increases in value will "be subject to any other method of taxation than "that stipulated in the charter." (Wright vs. Ga. "R. R. & Banking Co., **supra,** Headnote.)

So far the decision might be held to extend the exemption of the charter to the excess valuation of the property, over and above the authorized stock, only so far as that excess was due to "appreciation," "natural increase in value", and not to such increase in value as resulted from the expenditure of money.

But further on in the opinion we find—pages 427-8, the following:

> "We come now to the question as to whether so "much of the value of the company's railroad and

"appurtenances as exceeds in value the amount of "the authorized capital stock, under the charter and "amendments prior to 1863, is subject to taxation "as other property of like character, under the law "of the State. This value, it is admitted, exceeds by "four millions of dollars the nominal value of the "capital stock of said company, which excess, it "is further conceded, has been the result of natural "increase in the value of said property and by re- "newals, alterations and betterments of the same, "from time to time, by said Company."

Again: (pages 429-430) "Under the original "charter and certain amendments there exists today "an authorized capital stock of $4,156,000. * * "* * * * The railroad property including its "railway, depots, equipments and appurtenances "proper, have a present value of some four millions "of dollars in excess of the authorized capital. Now "the contention is that to the extent of this excess "the property of the company is assessable and "taxable as other property. * * * * * * An "investment made nearly seventy-five years since "of $4,156,000.00 has now a value of $4,000,000.00 "in excess of that cost. The property is the same "property. The conceded fact is that through re- "newals, alterations and betterments made from time "to time and the natural increase in the value of the "road this appreciation has come about."

So that the property held by this court to be included in the scheme of taxation provided in the Charter of The Georgia Railroad and Banking Company is the railroad covered by that charter with its franchises, present equipment and present appurtenances, although the value of the property has doubled, and without any reference to its present value.

So we can consider as finally established the propo-

sition that the property assessed—at least the great bulk of it—is not subject to assessment, or to taxation, so long as it is operated directly by The Georgia Railroad and Banking Company; and, that while so operated, the only relation which that property has to the subject of taxation, is that its net earnings are subject to a tax of one-half of one per cent. The one main question, therefore, is: Has the lease of that property so changed its status that it has become liable to taxation, like the property generally of the people of the State of Georgia?

The leasing of the railroad was contemplated in its original charter as a probable and proper purpose. (See Section 12 of the charter, quoted in opinion of Newman, J., page 62.)

The scheme of taxation is found in the subsequent Section 15 of the charter (Ibid. Record, page 62). The provision for leasing and the scheme of taxation were contemporaneous, were made at one and the same time. No limitation was put on the tax scheme, which restricted its application to the property while it was used in one of the two proposed ways, viz: by the corporation, and prevented its application when the same property was used in the **other** of the two proposed ways, viz: by its lessee. It would seem that the property, having been impressed with this tax scheme, would remain so impressed until that scheme was expressly lifted from it—and there could have been no better time to make this change —if a change was intended—than when provision was being made for leasing. But no change was made.

The Comptroller General contends that the Lease has converted this non-taxable property into taxable. The process, it is contended, by which this transformation has been effected, is this: The Lessees acquired an **"estate"** by which they became the virtual owners of the property during the term of the Lease. (Again attention is called to the fact that the position of the Comptroller General

in making the assessment was not that the Lessees acquired an interest **in** the property and that such **interest** is taxable, but that the **property** itself belongs to the Lessees at least in its relation to taxation.

USUFRUCT.

The Appellees (in the main Appeal) say that they have no **"estate"** but only a **usufruct.**

The deed of Lease, under which these Appellees are in possession of the property clearly creates only a usufruct. Nothing would suggest any other idea except the conventional length of the term and the magnitude of the property. No title to any property for any length of time passed by that instrument from the Lessor to the Lessee, but "simply the right to possess and enjoy the use" (Language of Section 3691 of the Code of Georgia of 1910) of the property. It conveyed no interest **in** the property, but a mere right to use it.

In support of this proposition, attention is called to certain controlling features of the lease.

The Railroad Corporation's right in this connection under its charter was "to rent or farm out their exclusive right of transportation or conveyance." See Opinion of Newman, J., Record 64).

The Lease instrument followed this language exactly, and the main concession or grant from the Lessor to the Lessee was this "exclusive right of transportation", etc. The "renting" of the railroad itself and of its equipment was merely incidental to the main grant "as the means of full enjoyment" of the main grant. (Record page 9.)

By this action The Georgia Railroad and Banking Company did not part with the title or ownership of any part of its property for so much as a single day. It **simply granted the use of it.**

The Lessee is to "return the property hereinbefore rented, farmed out and assigned." (Record, page 11.)

The Lessor does not transfer title to any of its personal property. The Lessor not only retains its title to such property as well as to the real property, but provides that as such personal property is consumed in the using, that which is acquired **in its place** shall be the property of the Lessor. The same provision is made as to property legitimately **added** to the leased property. "And all the property substituted for and added to that which is hereby rented and farmed out shall be the property of the party of the first part", etc. (Record, page 11.)

The owner and Lessor retained the right to enter upon and inspect the rented property at its pleasure in the following provision of the Lease, to-wit: "The party of the second part (the original Lessee) covenants for himself and his assigns that the party of the first part (Lessor) shall have the right to enter upon and inspect the railroad hereinbefore mentioned and appurtenances, including the rolling stock used on the same, as often as the party of the first part may think proper." (Record, page 12.)

The owner and Lessor retained such relation to the property as to recognize its liability for any taxes lawfully assessed against it, and has regularly paid the same from the commencement of the Lease on the great bulk of the property, and as to the rest, stipulated with the Lessee that the latter should pay them. Such stipulation would have been unnecessary and uncalled for if, as matter of law, the Lessee was liable for the taxes. The State, too, has recognized this condition and has collected taxes from the Lessor up to the commencement of this litigation, to-wit: twenty-nine years. So that the position of the State, as presented by this litigation, is that for all that period it has been exacting taxes from a party that did not owe them.

The owner and Lessor did not relieve itself by the Lease from its liability to the public, or seek to do so. It "is held liable to the public just as if it were engaged in operating the railroad itself". (Record, page 65).

The owner and Lessor not only fixed a time limit to the use and operation of the rented property: it also made it a part of the arrangement between itself and its tenant that the Lessor "reserves the right, in addition to all other remedies now usual or hereafter to become usual in the law, to enter upon and resume possession and enjoyment of all its property for the breach of any of the covenants or agreements of this Indenture". (Record, page 12).

The facts make this clearly a case of **Usufruct** and not of an **Estate**.

PERSONAL PRIVILEGE.

It may be fairly contended—and these Appellees do contend—that the interpretation of the charter of The Georgia Railroad and Banking Company by this Court (Wright vs. The Georgia R. R. & Banking Co., **Supra)** stamps the **property** with the charter's particular scheme of taxation so indelibly that the **property**, so long as it exists, retains that quality under any and all circumstances; but Appellees are not driven by necessity to take that advanced position.

For if the foregoing contention is correct, namely, that The Georgia Railroad and Banking Company has parted with none of its property, but has only granted the use of that property to a tenant, the proposition that exemption from taxation is a "personal privilege", which cannot be transmitted from the beneficiary to another, has no application in this case. It would apply if the Lessor, or landlord, in this case had voluntarily

stripped itself of its property by a sale or absolute alienation, or had lost it by a judicial sale. But nothing of this sort has happened. The owner of the privilege is still the owner of the property, to which the privilege applied. The owner remains as subject to taxation as it ever was, and needs this protection as much as it ever did.

"The exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to and to have **perished with that**".

Cooley on Taxation, 3rd Edition 377.

The Georgia Railroad and Banking Company has not "perished" by any means and is performing its functions just as closely in conformity with its charter in operating its properties through the Lease, contemplated by its charter, as if it had made no lease.

The "personal privilege" theory is derived from authorities where the facts were radically different from the facts in this case—cases where there was an absolute sale, judicial or otherwise, of the property enjoying the exemption—as in the leading case of Morgan vs. Louisiana, 93 U. S., 217, and the many cases following that decision.

In line with what has hereinbefore been shown of the action and non-action of The Georgia Railroad and Banking Company, indicating its continued living connection with the property, was the attitude of the State of Georgia itself until the commencement of these proceedings. Its courts have recognized and continue to recognize in the various suits against that Company, based on the acts and omissions of its tenants, that it is still the party responsible—and as responsible as ever—for the operation of these railroads; and the **executive branch of the State government has hitherto looked**

to that Company alone for its taxes. (See opinion of the District Judge, Record 65-66).

ESTATE.

This brief will not enter into an elaborate discussion of the technical law of Estates. That branch is argued fully in the brief of other counsel. However a few views on this aspect of the case are submitted.

The law of Georgia on the relations between the parties, created by a rent contract, is found in Section 3691 of the Code of 1910.

> "When the owner of real estate grants to another "simply the right to possess and enjoy the use of "such real estate, either for a fixed time or at the "will of the grantor, and the tenant accepts the "grant, the relation of landlord and tenant exists "between them. In such case no estate passes out "of the landlord and the tenant has only a usufruct, "which he cannot convey except by the landlord's "consent, and which is not subject to levy and sale; "and all renting or leasing of such real estate for "a period of time less than five years shall be held "to convey only the right to possess and enjoy such "real estate, and to pass no estate out of the land-"lord, and to give only the usufruct, unless the con-"trary be agreed upon by the parties and so stated "therein."

To meet the requirement of this Section in reference to the landlord's consent to any transfer of the contract by the tenant, the original contract was made to "William M. Wadley and **his assigns.**"

This Section contains two propositions:

(First) When a landlord grants to a tenant for years

merely the right to possess and use the leased premises, the tenant has only a usufruct—that is he acquires no title to, or ownership of, the leased property; and this limitation of the rights, acquired under the contract, applies to all contracts alike without reference to their length.

(Second) When the contract is for less than five years, the law presumes, in the absence of an express provision to the contrary, that the tenant has no estate—nothing he can transfer to another.

A third proposition may be sought to be **inferred**, and that is that where the contract is for more than five years, an estate does pass out of the landlord. But the Section does not say so, and such inference is not legitimate. The most that can be inferred from the silence of the Section at this point is that it is an open question whether an estate passed, to be determined by all the features of the contract.

So there is nothing in the length of the term of the Lease or in Section 3691, which enhances the quantity of interest acquired by the Lessees. It is not the land, it is not the personal property, it is not the franchises embraced in that instrument. It is the right to possess and use these properties; it is a usufruct.

As establishing the proposition that what the Complainants acquired under their lease was not an ownership for a period of years of the property embraced in the lease, attention is asked to the following authorities and comments upon them:

As soon as a lease has been delivered and accepted by parties competent to contract, a relation is created between lessor and lessee which is known as that of Landlord and Tenant.

Tiedman on Real Prop. Sec. 151, page 116.

A lease for a term of years is not a freehold estate, but a chattel.

Field vs. Howell, 6 Ga., 423;
Hutchison vs. Hodnett, 115 Ga., 993.

In the latter case it is expressly stated on page 994 that—citing authorities—

> "a tenant for years is never seised of the lands "leased. He acquires a right of entry upon the "land, and when he enters, he is possessed not of "the land but of a term for years, while the seisin "of the freehold remains in the lessor, and the les- "see's possession is the possession of him who has "the freehold."

In the case of Sykes vs. Benton, the tenant of a life estate rented to a lessee for the period of the life tenant's life the whole of the land of the life estate. This did not create an "estate" in the Lessee.

Sykes vs. Benton, 90 Ga., 402.

There is, and ever has been, in Georgia no separation of estates, for the purpose of taxation. All the separate estates, into which a fee is susceptible of division, are and ever have been merged in the fee and the fee has been taxed. The life tenant does not pay a tax on a life estate, but upon the whole property for the reason that for the time being he has the title of, and owns, the whole property, and even this is a matter between life tenant on the one hand and the remainder-man or reversioner on the other, in which the State has no concern. The State looks to the property and if during the life estate the life tenant failed to pay the taxes, the State would collect them out of the property, without making any distinction of life estate and fee simple estate.

In the case of W. & A. R. R. Co. vs. W. U. Tel. Co. 138 Ga. 420, it became necessary for the Supreme Court of Georgia to determine the nature of the relation between the Lessor and Lessee under a contract substantially the same in all material respects as that between The Ga. R. R. & Banking Co. and Wadley. The court says, page 430: "The relation of the State to the Lessee of its railroad is that of landlord and tenant. The Lessee has but a usufructuary interest in the posession of the leased premises for the specific uses named therein"—repeating what the court had said in 136 Ga. 625.

BETTERMENTS.

Petitioner in the Writ for Certiorari (Appellant in the main Appeal) contends that in any event Appellees are liable for taxes on property which their money has created. What is that property? It is the renewals and expansions of the rented railroads. It is in no sense property **different** from the original railroad. It is property which this Court has said (Wright vs. The Ga. R. R. & Banking Co.) is "the same property." It is property which has come into existence in order that the Railroad shall keep abreast of the times and thus fulfill its mission. Unquestionably if the Lessor had directly and not through an intermediary brought this property into existence, it would not be taxable.

If the Lessor could do this directly, it could do it by its tenant—especially the tenant under the very Lease, which the Legislature contemplated at the same time that it constructed this scheme of taxation for an owner, who the Legislature intended might at any time become a Lessor. This is exactly what is done in the Lease. It is provided that as a part of their duty as tenants for years, and under their contract, the Lessees shall keep the premises in repair and up to the relative standard of the property when they received it, at their own expense; but that where they make proper additions

they will be considered as having advanced the cost for the Lessor, and after the Lessees shall cease to use these additions by reason of the termination of the Lease, the Lessor will reimburse its agents the Lessees by the payment of a fair value.

After all said and done, this Railroad, increased in value by the growth of the country and by other natural processes, by the incorporation in it of better material and appliances, whenever renewals were made, and by additional tracks, depots, bridges, water tanks and rolling stock, is the same railroad which at its birth was covered by its charter. In its progress no stage can be designated at which the charter ceased to be operative.

If any other view of the subject were true, then The Georgia R. R. & Banking Co. lost this provision of its charter altogether long, long ago. In fact it commenced losing it from the beginning of its operation. The first new rail, laid down in the place of an old one, worn out, passed from under the protection of this provision of the charter. So also as to every new engine and every new car and every new thing about the railroad; so that by the time there had come about a complete renewal, this provision of the charter had spent itself—and the whole railroad became taxable. This Court has recognized two ways by which this exempt property would increase in value, viz: "natural increase in the value" and "renewals, alterations and betterments"; and has said in the clearest language and in more than one place, that the scheme of taxation kept pace with and embraced the increased value from these two sources.

This property has not, by anything which has happended in its history, become subject to taxation. Wheth-

er the temporary tenants of it hold any interest in it which is subject to taxation can be decided when that issue is made. It is sufficient, for the time, to say, **that issue is not made in this case.**

JOSEPH B. CUMMING,

Of Counsel for Respondents and Cross Respondents.

In this case the exemption of the lessor from taxation on its road which it has leased applies to betterments and improvements made by the lessee such as the lessor would have made to meet enlarging business and so also as to rolling stock substituted for that of the lessor and which under the lease belongs to the lessor.

Railroad property jointly used with exempted property but not part of the road originally exempted may be subject to assessment but not in one assessment covering both the classes of property.

201 Fed. Rep. 1023, modified and affirmed.

THE facts are stated in the opinion.

Mr. Samuel H. Sibley, with whom *Mr. John C. Hart* was on the brief, for petitioner. (For abstract of argument see *ante*, p. 675.)

Mr. Alex C. King, with whom *Mr. Jos. B. Currey*, *Mr. Bryan Currey*, *Mr. R. C. Alston* and *Mr. Philip H. Alston* were on the brief, for respondents and cross petitioners.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the railroad companies, respondents, to prevent the collection of a tax upon the Georgia Railroad, operated by them under a lease and assessed to them as their property. The District Court made a decree for the plaintiff with certain exceptions, which was affirmed on appeal and cross appeal by the Circuit Court of Appeals for the reasons given by the District Court. 199 Fed. Rep. 454. 201 Fed. Rep. 1023.

The main question is similar to that disposed of in *Wright* v. *Central of Georgia Railway Company*, just decided, *ante*, p. 674.

By its charter granted on December 21, 1833 (Laws of 1833, p. 256) the stock of the Company and its branches is subject only to a 'tax not exceeding one-half one per cent. per annum on the net proceeds of their investments.' § 15. This language is interpreted and held to constitute

a binding contract in *Wright* v. *Georgia Railroad and Banking Co.*, 216 U. S. 420. So it is admitted that the present tax could not be levied on the lessor. By § 12 of the same charter the Company is authorized to "rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the rail-road or rail-roads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon." So the State has convenanted that the Company's property shall be exempt from tax except upon its income which it is authorized to make in any of three ways. And as bearing on the different uses of the Company's franchise that were deemed possible in that day, as we remarked in the other case, we may add that by § 13, if any persons intrude upon the railroad by any manner of use thereof they shall forfeit to the Company all the vehicles and animals that may be so intrusively introduced and used; that by § 14 the Company, if it sees fit to farm out any part of its exclusive right, may prescribe the value and size of vehicles to be used or pass on its road, and the locomotive power; and that by § 22, the Company, if it prefers, instead of railroads may construct common roads and use steam carriages thereon.

The plaintiffs are operating the roads in question under a lease made to one Wadley to whose rights they have succeeded. *Georgia Railroad & Banking Co.* v. *Maddox*, 116 Georgia, 64. This instrument purported, in the language quoted above from § 12 of the charter, to 'rent and farm out' the privileges and roads of the lessor for a term of ninety-nine years from April 1, 1881. For the reasons given in the other case we cannot believe that if the company saw fit to gain 'the net proceeds of their investments,' (to one-half of one per cent. of which their tax was limited), by letting the whole road instead of allowing others to introduce carriages, the statute silently opened the right to resume as against the lessee all that

had been renounced as against the lessor. If the fee of the roads is taxable to no one while the liability of the lessor to the above mentioned one-half of one per cent. remains, an attempt to collect a tax upon the fee from the plaintiffs is an attempt on the part of the State to tax the leased property which was completely beyond the reach of its taxing power except in so far as permitted by the contract, the obligations of which could not be impaired without a violation of the contract clause of the Constitution of the United States. Thus the particular features of the case in hand take it without the rule applied in *Rochester Railway* v. *Rochester*, 205 U. S. 236, and other kindred cases, from which we have no purpose to depart.

Some subordinate questions remain. Betterments and improvements of the demised road such as the lessor naturally would have made to meet the necessities of an enlarging business stand on the same footing as the original road and are exempt. *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 427–432. *Gardner* v. *Georgia R. R. & Banking Co.*, 117 Georgia, 522, 532. The rolling stock substituted for or added to that turned over to the lessees became the property of the lessor as soon as acquired and also is exempt like that of which it took the place. The lessee covenants to return the property in as good condition as it was then in, and the lease provides that 'the property substituted for and added to that which is hereby rented and farmed out, shall be the property of' the lessor. 'Shall be' obviously means shall be when so substituted. It is not confined to such substituted property as may be on hand at the end of the lease. The lessor is to be kept continuously the owner of an equipped road. The Railroads not being domiciled in Georgia are not taxable there for stock and bonds of other companies merely appearing to be owned by them. Some necessary and proper improvements were made by the lessor before the lease and paid for by the proceeds of

bonds issued by it. We do not perceive why they should be put on a different footing from the others. And we are not prepared to say that terminals, &c., added to the demised property belonging to the lessor, although brought with $225,000 of money belonging to the lessees, were not reasonable betterments and exempt.

The Atlanta terminals require separate treatment. Besides so much of them as was embraced in the lease, there seems to be other land belonging to the West Point Company, and other land again of the Louisville and Nashville Railroad. By an agreement between the plaintiffs and the West Point Company this property is converted into and used as a joint terminal. The assessment complained of deals with this as a separate entity and item, and in the decree is excepted from the injunction. It appears to us that so much of the property as is part of the exempted line still is exempt. It is used for the purposes of the line, although the relations have become more complex. The rest may be subject to taxation, but not in this assessment. The decree will be modified in this respect, but otherwise is affirmed.

Decree modified and affirmed.

MR. JUSTICE LAMAR took no part in the decision.

Dissenting: MR. JUSTICE HUGHES, MR. JUSTICE PITNEY, MR. JUSTICE MCREYNOLDS.

WRIGHT, COMPTROLLER GENERAL OF GEORGIA, *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 162. Argued January 29, 1915.—Decided March 22, 1915.

Wright v. *Central Ry. of Georgia*, *ante*, p. 674, followed to effect that under the statutes of Georgia and the leases involved in this action executions for *ad valorem* taxes on railroads, the owners whereof were exempted by statute from a greater tax than a specified per cent on the income, could not be enforced against those in possession of the railroads as lessees.

The fact that owners of a railroad, who are exempted by statute from paying a greater tax than a specified per cent on the income thereof, lease the entire road to another company does not open the right of the State to tax such lessees on the fee of the property.